1994

Charles F. Gillmor and Nadine Gillmor v. Veigh Cummings, Jeffrey K. Garlick, Janet E. Garlick, W. Allen Pelton, Craig Haren, Julie Haren, Gerald Wohlford, Penelope Wohlford, Timber Lakes Corporation, a Utah corporation, Valley Bank and Trust company as Trustee for the W. Allen Pelton Trust : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

10490 CA

CHARLES F. GILLMOR and NADINE GILLMOR, Plaintiffs and Appellees, vs. VEIGH CUMMINGS, JEFFREY K. GARLICK, JANET E. GARLICK, W. ALLEN PELTON, CRAIG HAREN, JULIE HAREN, GERALD WOHLFORD, PENELOPE WOHLFORD, TIMBER LAKES CORPORATION, a Utah corporation, VALLEY BANK AND TRUST COMPANY AS TRUSTEE FOR THE W. ALLEN PELTON TRUST, Defendants and Appellants.	Case No. 940490-CA (Priority No. 15)

BRIEF OF APPELLANT

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
SUMMIT COUNTY, STATE OF UTAH
THE HONORABLE HOMER F. WILKINSON, PRESIDING

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Plaintiffs and Appellees,	)	
vs.	)	
VEIGH CUMMINGS, JEFFREY K. GARLICK, JANET E. GARLICK, W. ALLEN PELTON, CRAIG HAREN, JULIE HAREN, GERALD WOHLFORD, PENELOPE WOHLFORD, TIMBER LAKES CORPORATION, a Utah corporation, VALLEY BANK AND TRUST COMPANY AS TRUSTEE FOR THE W. ALLEN PELTON TRUST,	)	**Case No. 940490-CA** **(Priority No. 15)**
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LIST OF ALL PARTIES
TO THE PROCEEDING

The Parties to the proceeding are all listed in the caption of the case.

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I.

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2-2(4), which provides as follows:

> (4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction.

The supreme court had original jurisdiction over this matter pursuant to Utah Code Ann. § 78-2-2(3)(j).

II.

STANDARD OF REVIEW AND STATEMENT OF ISSUES PRESENTED FOR REVIEW WITH SUPPORTING AUTHORITIES

A. STANDARD OF REVIEW.

The standard of review with respect to issues 1, 2, 3 and 7 in this case is as follows:

> After the marshalling all of the evidence which supports the decision of the court on the respective issues heretofore set forth, is there any competent evidence upon which to base the decisions of the trial court? If so, the appellate court must affirm the decision of the lower court; and if not, the appellate court must reverse the trial court's decision and direct it to enter judgement in favor of the defendant.
>
> A trial courts findings of fact are clearly erroneous if they are so lacking in support as to be against the clear weight of the evidence.
>
> Despite the evidence, were the trial court's findings so lacking in support as to be against the clear weight of evidence, thus making them clearly erroneous.

The standard of review with respect to issues 4, 5 and 6 in this case is as follows:

> The appellate court accords no particular deference to conclusions of law but rather reviews them for correctness. Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1039 (Utah 1989); Scharf v. BMG Corp., 700 P.2d 1068. 1070 (Utah 1985); Utah R.Civ.P.52(c).

B. STATEMENT OF ISSUES PRESENTED FOR REVIEW

ISSUE 1. Malice. Was the Court's ruling erroneous and against the clear weight of the evidence since there was no competent evidence of malice upon which to base a judgment against the defendant for attorneys fees?

Standard of Review:

A trial courts findings of fact are clearly erroneous if they are so lacking in support as to be against the clear weight of the evidence. Doelle v. Bradley, 784 P.2d 1176, 1178 (Utah 1989); Sorenson v. Kennecott-Utah Copper Corp., 873 P.2d 1147.

Findings are clearly erroneous if they are against the clear weight of evidence or if the appellate court reaches (a) definite and firm conviction that a mistake has been made. Edwards & Daniels Architects, Inc. v. Farmers' Properties, Inc., 865 P.2d 1382, 1385 (Utah App. 1993).

Despite the evidence, were the trial court's findings so lacking in support as to be against the clear weight of evidence, thus making them clearly erroneous. West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1313 (Utah App. 1991).

ISSUE 2. Survey. Was the Court's ruling erroneous and against the weight of the evidence since there was no competent evidence to show that Plaintiff's survey was correct in that it was not done in accordance with standard survey procedure and

Defendant's survey was done in accordance with standard survey rules and this survey evidence showed that Defendant was the owner of the property at issue?

Standard of Review:

The Standard of Review is the same as set forth above for Issue 1.

ISSUE 3. Acquiescence. Was the Court's ruling erroneous and against the weight of the evidence since the Defendant proved the elements of boundary by acquiescence and there was no competent evidence introduced to refute this proof?

Standard of Review:

The Standard of Review is the same as set forth above for Issue 1.

ISSUE 4. Evidence Of Value. Did the Court err in refusing to admit evidence of value of the disputed property?

Standard of Review:

The appellate court accords no particular deference to conclusions of law but rather reviews them for correctness. Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1039 (Utah 1989); Scharf v. BMG Corp., 700 P.2d 1068. 1070 (Utah 1985); Utah R.Civ.P.52(c).

ISSUE 5. Offset. Did the Court err in refusing to admit evidence of amounts paid in settlement by the Title Company? Is Defendant entitled to an offset for these amounts?

Standard of Review:

The Standard of Review is the same as set forth above for Issue 4.

ISSUE 6. Adverse Possession. Did the Court err in refusing to admit Defendant's evidence of adverse possession?

Standard of Review:

The Standard of Review is the same as set forth above for Issue 4.

ISSUE 7. Slander Of Title On The Counterclaim. Did the Defendant prove the elements of slander of title on its counterclaim and was there competent evidence introduced to refute this proof?

Standard of Review:

The Standard of Review is the same as set forth above for Issue 1.

III.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS WHOSE INTERPRETATION IS DETERMINATIVE OF THE CASE

Utah Code Ann. § 78-12-7.1 provides as follows:

> **Adverse possession - Presumption - Provisio - Tax title.**
>
> In every action for the recovery or possession of real property or to quiet title to or determine the owner thereof the person establishing a legal title to such property shall be presumed to have been possessed thereof within the time required by law; and the occupation of such property by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that such property has been held and possessed adversely to such legal title for seven years before the commencement of such action. Provided, however, that if in any action any party shall establish prima facie evidence that he is the owner of any real property under a tax title held by him and his predecessors for four years prior to the

> commencement of such action and one year after the effective date of this amendment he shall be presumed to be the owner of such property by adverse possession unless it appears that the owner of the legal title or his predecessor has actually occupied or been in possession of such property under such title or that such tax title owner and his predecessors have failed to pay all the taxes levied or assessed upon such property within such four-year period.

The Professional Rules of Survey Standards, Rule defining ranking of calls provides as follows:

> Ranking of calls is based upon the rules of evidence and is commonly broadened to assist in interpretation of all forms of descriptions and boundary recover. The most common hierarchy of calls is as follows:
>
> 1. Natural monuments;
> 2. artificial monuments;
> 3. distances;
> 4. directions; and
> 5. area.
>
> Any element of a description of a parcel may be rejected or overruled, based upon a review of the best evidence available. The courts have usually held that the most important and overriding factor in the interpretation of property descriptions is the intent of the parties. All of the words of a deed are to be considered so that evidence that best demonstrates the intention of the buyer and seller will prevail, in most cases. With this in mind, the writer of a metes and bounds description should ensure that the intention of the parties is clearly expressed.
>
> ...A poor measurement to the correct corner is much superior to a precise measurement to a false corner. In real property boundaries, it is the physical location of the corners that is important.

IV.

STATEMENT OF THE CASE

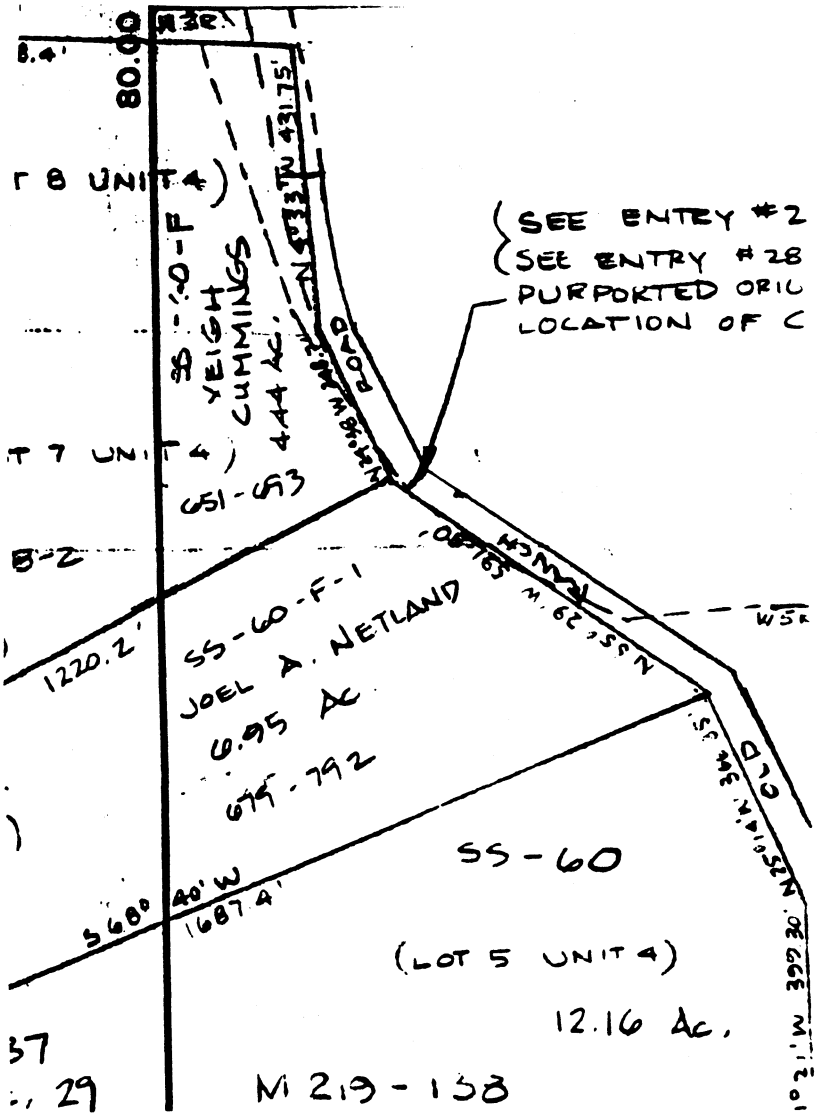
A. THE NATURE OF THE CASE.

This case involves a boundary line dispute between two neighbors regarding the ownership of 11,777 square feet of property adjoining Old Ranch Road, which runs north and south near Snyderville, Utah. The Plaintiffs Appellees Gillmors own property on the east side of the road, and the Defendant Appellant Cummings owns property on the west side of the road. The Plaintiffs Appellees Gillmors claim that they own a small strip of land on the west side of the road. Both the Plaintiffs Appellees Gillmors' and Defendant Appellant Cummings' surveys go to Ranch Road, but the Plaintiff/Appellees Gillmors claim that a small portion of Old Ranch Road was moved to the east, leaving part of their land on the west side of the road adjacent to Cummings' property. Cummings denied the road moved, but claims even if it did, he has since acquired title to the property by boundary line by acquiescence and adverse possession.

Defendant Appellant Cummings subdivided his property including the disputed strip and sold lots upon which homes were built. The remaining Defendants Garlick, Pelton, Haren and Wohlford owned lots which the Plaintiffs Appellees Gillmors claim include their disputed strip within these boundaries. Homes were build upon these lots and the homeowners title insurance policies were issued to these lot owners. The Title Company settled with Plaintiffs Appellees Gillmors prior to trial by paying them $45,000 for title

to the disputed strip and to settle all claims against these homeowners asserted by Plaintiffs Appellees Gillmors. The only issue left for trial after the settlement was claimed by Plaintiffs Appellees Gillmors against Defendant Appellant Cummings for attorneys fees expended in the prosecution of this litigation.

Defendant Appellant Cummings counterclaimed for slander of title on adjoining property. The disputed strip is illustrated by the following diagram:



B. THE COURSE OF PROCEEDINGS AND DISPOSITION IN THE LOWER COURT.

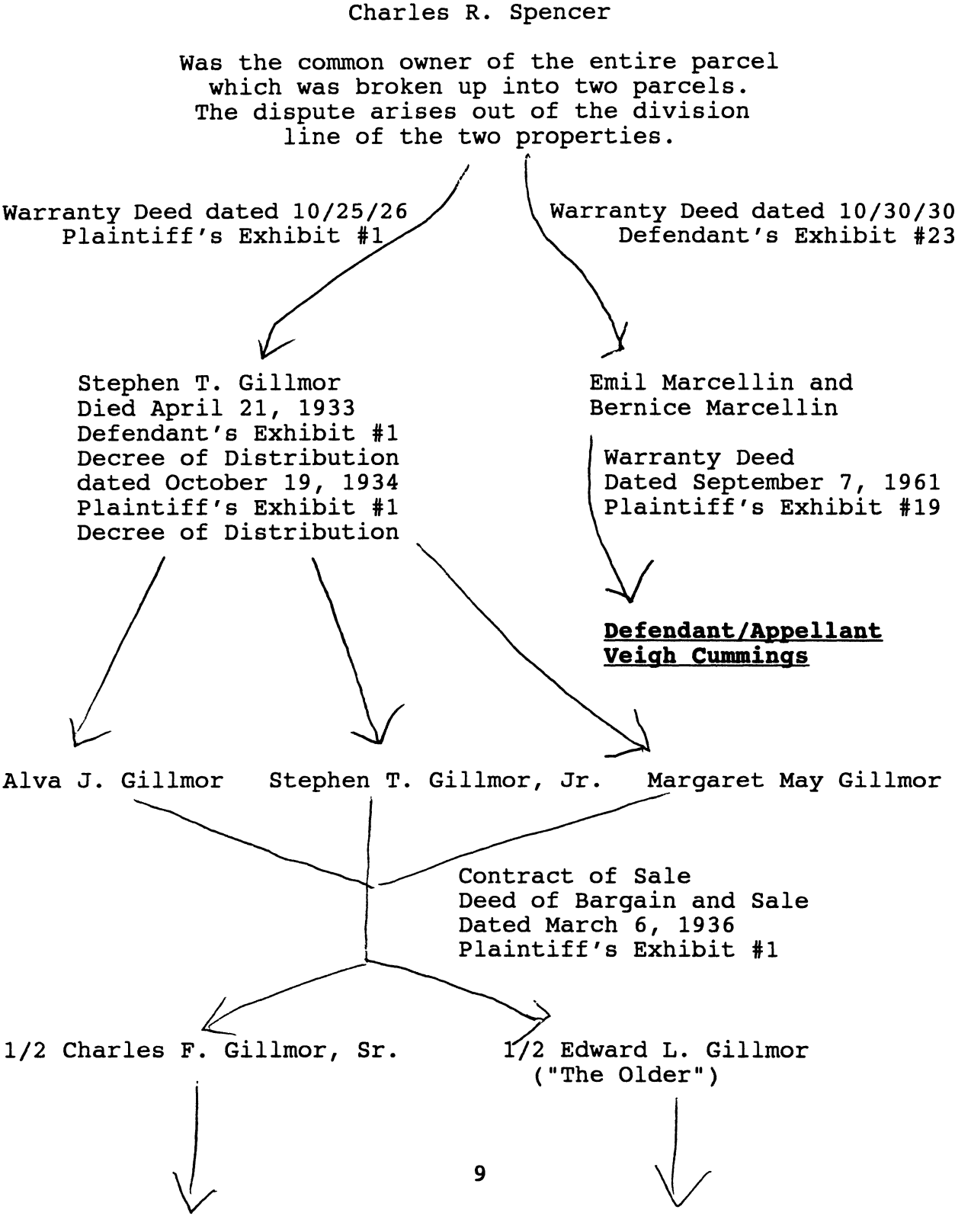
Trial was held on August 10, 1993 in the Third District Court of Summit County, Coalville, Utah. After the Plaintiffs Appellees Gillmors had rested and in light of the fact that in the view of Defendant/Appellant Cummings the Plaintiff had not proven damages as to attorneys fees, the Defendant/Appellant elected to rest. A Judgement and Decree of Quiet Title was entered on November 23, 1993 with a provision that allowed the Plaintiffs to reopen their case to prove their damages as to attorneys fees.

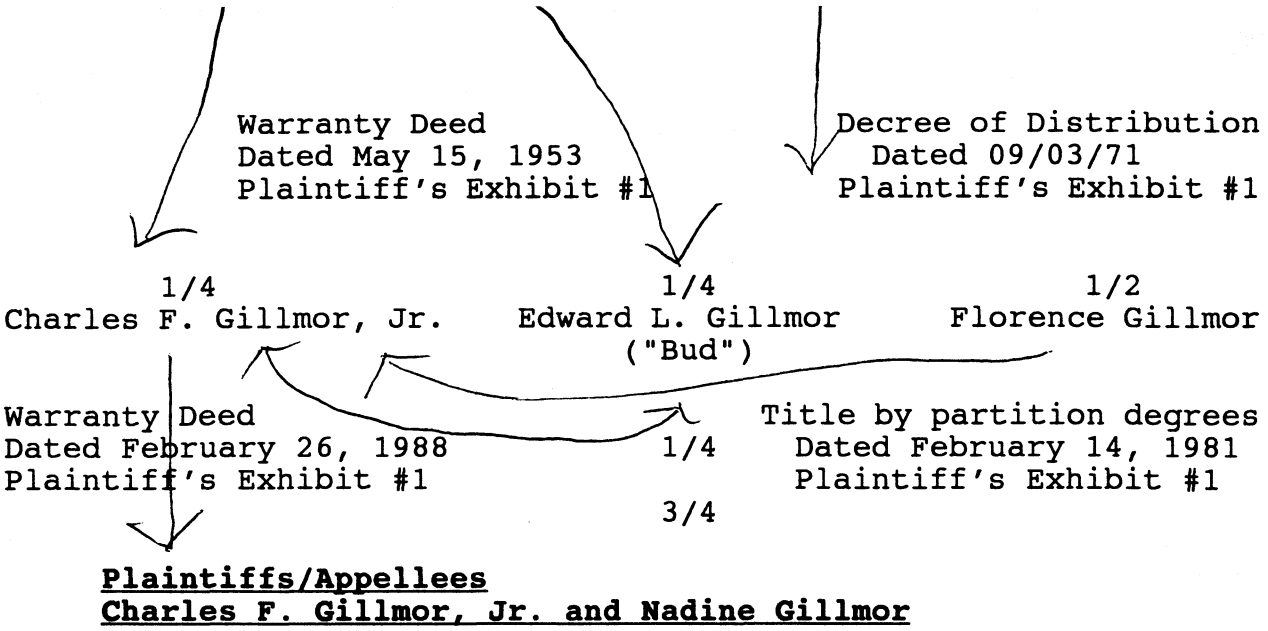
Defendant Appellant Cummings moved the court for a new trial or in the alternative to reopen the trial to allow him to refute the attorneys fees and Plaintiffs Appellees Gillmors' general allegations. Judge Wilkinson denied the motion for a new trial but allowed the trial to be reopened to allow the Plaintiffs to establish attorneys fees and also to allow Defendant Appellant Cummings to present his case in defense.

Further trial proceedings were held on February 16 and 17, 1994 with the closing arguments on February 24, 1994. The Amended Judgment and Decree of Quiet Title was entered by the clerk of the Summit County Court on May 10, 1994 awarding Plaintiffs Appellees Gillmors damages for attorneys fees in the amount of $52,563.54. It is from this judgment that Defendant Appellant Cummings is now appealing.

C. STATEMENT OF THE FACTS.

1. The deeds introduced into evidence at the trial are set forth in the following title drain as follows:





2. The deeds in the title drain emanate from common grantors, Charles R. Spencer and Isabelle Spencer. The first two deeds were given to Stephen T. Gillmor on October 25, 1926 and the second deed was given to Emil Marcellin in 1931. The description contained in the deed to Marcellin was all the rest of the property owned by Charles R. Spencer less that portion already deeded to Stephen T. Gillmor. The two separate parcels at that point had a common boundary legal description and the only factual issue is where that legal description fell on the ground.

3. A dispute of facts was erroneously injected into the case by virtue of a partition decree entered into, to settle litigation between Edward L. Gillmor and Siv Gillmor, his wife V. Florence Gillmor, Charles F. Gillmor (one of the plaintiffs in this action) and Melba Gillmor his wife, Civil No. 223998 Third District Court, Salt Lake County, State of Utah (Plaintiff's Exhibit #1). Charles F. Gillmor is now married to Nadine Gillmor, the other plaintiff herein. A new legal description was generated for the purpose of

that decree that differed from the descriptions used by Charles R. Spencer when he divided the property originally (R001372 and Exhibit #1). The boundary line between the disputed properties was described differently in the partition decree than it was in the Charles R. Spencer deeds dated:

(a) October 25, 1926, and

(b) October 30, 1930.

The deeds from Charles R. Spencer to Stephen T. Gillmor and Bernice Marcellin used the following boundary line description to define the boundary line between the two parcels of property:

> ...thence West approximately 5 rods to a point on the Easterly side of the aforesaid 6 rod wide road and at a point 3 rods Easterly from the center line of said road and at right angles thereto; thence along the Easterly side of said road and 3 rods Easterly from the center line thereof and at right angles thereto, Northerly and Westerly to a point **3 rods East from the Southwest corner to the Northwest Quarter of Section 28, aforesaid**; thence West 3 rods; thence Northwesterly on a direct line 61 rods, more or less, to the point of beginning. (Emphasis added) (Plaintiff's Exhibit #1).

The description generated for the partition decree is set forth as follows as it pertains to the dividing line between the two properties.

> ...thence southeasterly 1006.50 feet **more or less to the west quarter corner** of said section 28, thence east 49.50 feet, thence southeasterly along a road to a point that is 82.50 feet west of the point of beginning thence east 82.50 feet to the point of beginning. (Emphasis added)

4. The deeds from Spencer to Gillmor and from Spencer to Marcellin have one point of beginning and the partition decree has a different point of beginning. The Spencer deeds describe the property by using a clockwise boundary description and the

partition decree described the property using a counterclockwise boundary description.

5. The reason so many of the facts relied upon herein are cited to Plaintiff's Exhibit #1 is because it was a many paged exhibit containing all of the title documents in Plaintiff's chain of title.

6. Emil Marcellin told Defendant Appellant Cummings that Veigh Cummings and his co-owner owned the property west of the county road. This included the disputed strip of property (R1497 and Pelton testimony).

7. The partition decree description did not close by at least 200 feet (R 1764, 1765, 1412).

8. The survey of the partition decree description used a distance call in preference to a call to a monument. The survey of Kent Wilde who testified at the trial that the Spencer deed description went to the road relied on the call to the monument rather than the distance call.

9. Defendant Appellant Cummings occupied the property since 1961 and at no time during his occupancy did anyone dispute his ownership (R 001587).

V.

SUMMARY OF ARGUMENTS

A.

SUMMARY OF ISSUE ONE

MALICE

THE COURT'S RULING WAS CLEARLY ERRONEOUS AND AGAINST THE CLEAR WEIGHT OF THE EVIDENCE BECAUSE THERE WAS NO COMPETENT EVIDENCE OF MALICE UPON WHICH TO BASE A JUDGMENT AGAINST THE DEFENDANT FOR ATTORNEYS FEES.

The clear and convincing evidence at trial showed Defendant Appellant Cummings bore no malice and demonstrated none in his actions with respect to the property. He relied on his deeds in the chain of title, all of which tied his east line description to "Old Ranch Road". Defendant Appellant Cummings and his co-owner, Al Pelton, from whom Defendant/Appellant Cummings later purchased the remaining 1/2 interest in the property, were both told by Emil Marcellin that they owned all of the property west of the "Road". No one had questioned or challenged Defendant Appellant Cummings' possession of all of the property west of the "Road" from 1961 when he purchased it until this action was commenced on October 15, 1987.

B.

SUMMARY OF ISSUE TWO

SURVEY

THE COURT'S RULING WAS CLEARLY ERRONEOUS AND AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE THERE WAS NO COMPETENT EVIDENCE TO SHOW THAT PLAINTIFF'S SURVEY WAS CORRECT IN THAT IT WAS NOT DONE IN ACCORDANCE WITH STANDARD SURVEY PROCEDURE AND DEFENDANT'S SURVEY WAS DONE IN ACCORDANCE WITH STANDARD SURVEY RULES AND THIS SURVEY EVIDENCE SHOWED THAT DEFENDANT WAS THE OWNER OF THE PROPERTY AT ISSUE.

Kent Wilde, a civil engineer and licensed surveyor, surveyed the boundary line description as it was set forth in both Defendant Appellant Cummings' and Plaintiffs Appellees Gillmors' description acquisition deeds. He testified that his survey ran along the existing road and that, therefore, all of the property west of the road was within Defendant Appellant Cummings' legal description and outside of Plaintiffs Appellees Gillmors' legal description. James West, Plaintiffs Appellees Gillmors' surveyor testified to the contrary, but his survey was fatally flawed for the following reasons:

(1) He used the partition decree's boundary line which was outside of the chain of title.

(2) There was a discrepancy between a call to a monument and the distance to that monument. He used the distance call by mistake because the Rules of Surveying require that in that situation, one must use the monument, which was the road, and had he done so, his survey would have been consistent with Kent Wilde's.

(3) His survey did not close by more than 200 feet.

For each and all of these reasons, his survey must be rejected.

C.

SUMMARY OF ISSUE THREE

ACQUIESCENCE

THE COURT'S RULING WAS CLEARLY ERRONEOUS AND AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE THE DEFENDANT PROVED THE ELEMENTS OF BOUNDARY BY ACQUIESCENCE AND THERE WAS NO COMPETENT EVIDENCE INTRODUCED TO REFUTE THIS PROOF.

Laborious attempts to marshall the evidence contrary to boundary line by acquiescence have revealed that there is no such evidence and Plaintiffs Appellees Gillmors should be required to refute this from the record if they can.

The evidence shows that Defendant Appellant Cummings fenced the property in dispute and occupied it without complaint or interference for 23 years which gives him title by acquiescence to the disputed strip.

D.

SUMMARY OF ISSUE FOUR

EVIDENCE OF VALUE

THE COURT ERRED IN REFUSING TO ADMIT EVIDENCE OF VALUE OF THE DISPUTED PROPERTY.

The Trial Court erred when it declined to admit Dale Jackman's appraisal or his testimony of the value of the land in dispute. Attorneys fees should bear some reasonable relationship to the primary amount in dispute. Dale Jackman's proffered testimony was that the disputed strip had a value of $7,000.00. This testimony was relevant for two purposes:

(1) To show that an award of attorneys fees in the amount of $52,000.00 was excessive in view of the small amount of value in the disputed property.

(2) That figure should have been subtracted from the $45,000.00 which the Title Company paid as the reasonable portion to quiet title to the property and the balance of $38,000.00 should be credited to the attorneys fees judgment.

E.

SUMMARY OF ISSUE FIVE

OFFSET

THE COURT ERRED IN REFUSING TO ADMIT EVIDENCE OF AMOUNTS PAID IN SETTLEMENT BY THE TITLE COMPANY. DEFENDANT IS ENTITLED TO AN OFFSET FOR THESE AMOUNTS.

The Trial Court erred when it declined to admit evidence of amounts paid in settlement to Plaintiffs Appellees Gillmors by the Title Company and ruled that said amounts could not be used as an offset for attorneys fees awarded at trial after credit was given for the fair market value of the property. By not crediting the settlement amounts, Plaintiffs Appellees Gillmors would receive double compensation and Defendant Appellant Cummings would be vulnerable to double damages in further litigation by the Title Company in Civil No. 940300009 to seek reimbursement for the settlement which they made.

F.

SUMMARY OF ISSUE SIX

ADVERSE POSSESSION

THE COURT ERRED IN REFUSING TO ADMIT DEFENDANT'S EVIDENCE OF ADVERSE POSSESSION.

The Trial Court erred when it declined to admit Defendant Appellant Cummings' evidence on adverse possession which would have demonstrated that from 1961 until 1987, Cummings and his successors paid all of the property taxes on the property and thus would have been entitled to receive judgment on the theory of Adverse Possession as provided in the statute. The Court by doing so ruled as a matter of law that the Defendant Appellant Cummings was not

entitled to assert a claim for adverse possession and this was a question of fact to be tried at the trial on its merits.

G.

SUMMARY OF ISSUE SEVEN

SLANDER OF TITLE ON THE COUNTERCLAIM

THE DEFENDANT PROVED THE ELEMENTS OF SLANDER OF TITLE ON ITS COUNTERCLAIM AND THERE WAS NO COMPETENT EVIDENCE INTRODUCED TO REFUTE THIS PROOF.

The evidence and testimony at trial demonstrated that Defendant Appellant Cummings' title to his property was slandered when Plaintiffs Appellees Gillmors recorded the survey map in 1987 followed by the filing of a lis pendens which frustrated a proposed sale that was pending on the property. Cummings is entitled to judgment against Plaintiff/Appellees Gillmors for Slander of Title.

VI.

ARGUMENT

A.

MALICE

THE COURT'S RULING WAS CLEARLY ERRONEOUS AND AGAINST THE CLEAR WEIGHT OF THE EVIDENCE BECAUSE THERE WAS NO COMPETENT EVIDENCE OF MALICE UPON WHICH TO BASE A JUDGMENT AGAINST THE DEFENDANT FOR ATTORNEYS FEES.

Utah law does not allow an award of attorneys fees in a quiet title action unless they can be based upon one of the following grounds:

(1) Malice on the part of the defendant.

(2) A showing of bad faith prosecution of the litigation under Utah Code Ann. § 78-27-56.

(3) A contractual provision allowing such an award.

The evidence does not show nor do the Plaintiffs Appellees Gillmors contend that there is either bad faith or a contractual provision upon which to claim attorneys fees. Therefore, in order to prevail on this issue, the Plaintiffs Appellees Gillmors must show malice.

Two legal issues should now be considered in connection with the malice question:

(1) What standard must be met under Utah law to establish malice in a quiet title action?

(2) How does this standard distinguish between those cases in which an award of attorneys fees is appropriate and those cases which are routine quiet title actions where an award of attorneys fees would be inappropriate?

Attorneys fees have been held to be recoverable as special damages if incurred to remove a cloud placed by the defendant on the title if the elements of a slander of title action have been proven. See Bass v. Planned Management Services, Inc., 89 Utah Advanced Reports 11, Utah 1988, Dowse v. Doris Trust, 116 Utah 111, 208 P.2d 958, Misco Leasing, Inc. v. Keller, 490 F.2d 545, 549 (10th Cir 1974).

In order to qualify for a recovery of attorneys fees, the elements of a slander of title action must be proven.

These elements are set forth as follows:

First, there must be a publication, either oral or written, of a slanderous statement. A slanderous statement is one that is derogatory or injurious to the legal validity of an owner's title

or his or her right to sell or hypothecate the property; second, the statement must be false; third, the statement must have been made with malice; and, fourth, the statement must cause actual or special damages to the plaintiff. See Jack B. Parsons Companies v. Nield, 751 P.2d 1131, 1134 (utah 1988); Dowse v. Doris Trust Co, 116 Utah 106, 110-11, 208 P.2d 956, 958 (1949). See also McNichols v. Conejos-K Corp., 29 Colo.App. 205, 209, 482 P.2d 432, 434 (1971); Cardon v. McConnell, 120 N.C. 461, 27 S.E. 109 (1897). See generally 50 Am. Jur. 2d Libel and Slander §541 (1970).

The court stated in Bass supra, at 12:

> There are no general or presumed damages in slander of title actions. Special damages are ordinarily proved in a slander of title action by evidence of a lost sale or the loss of some other pecuniary advantage.

The court stated in Bass, that one of the reasons Bass could not recover an award for damages for slander of title was...

> Plaintiffs produced none of the prospective buyers at trial, and there was no evidence of any lost sales.

See Bass supra at page 12.

In the instant case, the Gillmors settled their case prior to trial with the parties to whom Veigh Cummings had sold the property. Any attorneys fees incurred after that date were not incurred in an effort to clear title and should not be awarded. In fact, no attorneys fees whatever should be awarded because no lost sale was proven which was a threshold requirement which had to be met before any attorneys fees at all could be awarded.

It now becomes the duty of Defendant Appellant Cummings to marshall the evidence by listing all of the evidence supporting the

finding on malice which is now being challenged and to demonstrate that all of such evidence taken together was against the clear weight of the evidence and, therefore, the lower court's ruling was clearly erroneous. Alta Indus. Ltd. v. Hurst, 846 P.2d 1282, 1286 (Utah 1993); Saunders v. Sharp, 806 P.2d 198, 199 (Utah 1991); State v. Moosman, 794 P.2d 474, 475-76 (Utah 1990); Grayson Roper Ltd. v. Finlinson, 782 P.2d 467, 470 (Utah 1989); Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 899-900 (Utah 1989); In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989); Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985); In re Estate of Hamilton, 869 P.2d 971, 977 (Utah App. 1994); Willey v. Willey, 866 P.2d 547, 551 n.2 (Utah App. 1993); Baker v. Baker, 866 P.2d 540, 543 (Utah App. 1993); Robb, 863 P.2d at 1327; Commercial Union Assoc. v. Clayton, 863 P.2d 29, 36 (Utah App. 1993); State v. Hayes, 860 P.2d 968, 972 (Utah App. 1993); Gray, 851 P.2d at 1225; King v. Industrial Comm'n, 850 P.2d 1281, 1285 (Utah App. 1993); Johnson v. Board of Review, 842 P.2d 910, 912 (Utah App. 1992); State v. Peterson, 841 P.2d 21, 25 (Utah App. 1992); State v. Hurst, 821 P.2d 467, 471 (Utah App. 1991).

The Defendant Appellant herewith marshals the evidence in support of a finding of malice and submits the following:

Mr. Kinghorn evaluated the elements of malice and read from the Parley Neeley deposition as follows: (R. 001540 - R. 001545)

The third element is malice. Under the cases, malice need not be shown as actual malice. It need only be shown by the doing of a willful or reckless act in disregard in the rights of others. That's where Mr. Neeley's testimony becomes interesting.

It's also interesting that Mr. Cummings has testified, I think inconsistent with the testimony of Mr. Neeley, and what I would like to do is point out to the court the testimony of Mr. Neeley who is a man who prepared the legal descriptions which were used in the deeds that Mr. Cummings signed that slandered our title.

Mr. Neeley prepared I believe exhibit no. 21, the two drawings of the Treasure Mountain Estates, and in his testimony, this is what he says about what he was instructed to do to prepare his survey. In response to a Question--

The Court: Where are you?

Mr. Kinghorn: I'm going to start at page 8 your honor, the statement of Parley Neeley, which is page 8, line 20. I said:

Q. Mr. Neeley, did you go out to the area of the survey and physically conduct a survey of the property?

A. I believe so, yes. I have been out there, and I believe I was there when a survey was done.

Q. Did you go out there with your client to do the survey work?

A. I didn't go out with Jackson Howard, I went out with someone else it was one of two.

Q. Why do you say that?

A. I don't know whether it was Elrod Starley or Veigh Cummings, but one of those two. I think it was Veigh Cummings.

Q. Do you recall where you met Mr. Cummings when you started this survey work?

A. If I remember right, I met him at the Newhouse Hotel and he came up to Snyderville where the survey was conducted. I went with him.

Q. Tell me what happened when you went up there with Mr. Cummings. How were you instructed to perform the worked that you preformed and tell us what you did.

I was asking Mr. Neeley, if you turn back to page 5 and page 6 and 7, I was asking him specifically about legal descriptions that are

on the drawing which is exhibit no. 21. In response to my question about how he was instructed to perform the survey and what he did, he said.

The Court: Where are you now?
Mr. Kinghorn: Page 90. Line 20. He said: There were fences surrounding the property on all sides. There was a road on the east side and a road on the south side, But there was fence along that county road. However, I was told to go the center of the middle of this road.
Q. Who gave you those instructions?
A. Whoever I went with. I think it was Mr. Cummings.
Q. Did he show you corners and boundaries that he wanted you to survey?
A. I don't know that we physically walked out to them, but standing in various places, they were pointed out.
Q. Did he indicate to you that was the extent of the property he owned?
A. Indicated that was the extent of the property we were to do our work on.
Q. Were you ever furnished a copy of a deed and asked to survey the description on the deed in connection with this work, Mr. Neeley?
A. I have looked through the folder here, and I see no evidence of descriptions or deeds. I think that's indicative of why we call this a "Post Survey."

(Mr. Kinghorn) I asked him:
Q. What do you mean by "Post Survey"?
A. That's language used on the exhibit, "Post Survey." We use it in our office as the area that's being posted by the owner or the owners, outlined by the physical monuments, natural or artificial. In this case it would be artificial.
There are wooden fences and roads.

Mr. Kinghorn: What's clear from the testimony of Mr. Neeley, and he also goes on to tell about how he did perimeter descriptions and he calculated descriptions for lots, but what's important about Mr. Neeley's testimony, your honor, is that it's clear Mr. Cummings, first of all, he has a deed from Mr. Marcellin, and he has taken title to property under legal description in that deed, and in fact his

> partner Mr. Pelton had used that identical legal description in conveying property back to him in 1965, which is the same year this survey was done.
>
> Mr. Cummings had access to that deed. Mr. Cummings had that deed, obviously, in his transaction with Mr. Pelton, but he didn't use that deed. Then he instructed Mr. Neeley to go out and perform the survey. Instead, he took him out there and had him survey something entirely different than the description on the deed. What happens to the property that's in dispute here, Mr. Cummings wasn't careful, and that's the kind of willfulness and recklessness that our court's recognize as implied malice.
>
> The second position I would point to as evidence of implied malice here is the inconsistent statements he made to Frank Marcellin the other day. This just came out in the course of my interview with Mr. Marcellin. I asked him if he ever talked to Mr. Cummings about this, and he said, "Well, the other day he said this to me about why he thought owned property. He just assumed he owned it."
>
> He never told Mr. Marcellin, "Frank, your dad told me I owned this property." He didn't come out and tell that to Mr. Marcellin. That's his testimony in court today.
>
> But that's now what he told Frank two or three days ago when they were eyeball to eyeball out on the property and talking about the exact area in dispute. That's evidence of an inconsistent statement by Mr. Cummings and is also further evidence of malice, that he has knowledge of what he did, he knows what he did under these circumstances.

What Mr. Marcellin testified to as to the meeting with Mr. Cummings is as follows: (R. 001526 - R. 001530)

> Q. (Mr. Kinghorn) During this past week, did you have occasion to meet with veigh Cummings on his property that's in dispute in this case?
> A. Yes, I did.
> Q. Tell us why you were there, what you were doing.
> A. I took him and his attorneys out to the

place in question, showed them where the east-west property line was, took Mr. Cummings' attorney down off the bottom of the hill and showed him where our property line ran north to south, and then came back up and was up there. And I told Veigh, I says, "I always though you bought this piece of property from the Gillmors."
Q. What piece of property were you referring to?
A. That piece of property that's--That's where Al Pelton and the Garlick home is, that's to the west of the now-present Old Ranch Road.
Q. Let me refer you to the exhibit that we have marked and which you've testified from before. Let me refer you to sheet no. 2 of Exhibit No. 2, and I'll ask: Does this sheet depict the property you were asking Mr. Cummings about?
A. Yes.
Q. When did this conversation take place?
A. I believe it was last Friday, and it was somewhere about 10:30, 11:00 o'clock in the morning.
Q. Who was present besides you and --.
A. Veigh Cummings, his attorney and the gentleman in back with the tie on, and the lady to the right with the glasses on.
Q. Did you ask Mr. Cummings some questions about this ownership?
A. Yes, I did.
Q. Tell us what you said and what he said.
A. I asked him, "I always though you bought this property from Gillmors," Because I told him where our property line was, and our dad always showed us where that property line went.

Mr. Summerhays: objection to what his father told him.

The Court: I'll sustain as to what his father told him; I'll overrule as to what he saw, what he saw his father do, where his father walked on the property line.

Mr. Summerhays: Move to strike those portions of what--

The Court: I would grant that.

Mr. Kinghorn: Thank you. did you take Mr. Cummings down to the area that you have generally as this black line you initialled here on sheet 2 of exhibit 2?
A. I did not.

Q. You did not take Mr. Cummings down there?
A. I did not.
Q. Did you go down there with any of the others?
A. Mr. Summerhays
Q. Where did this conversation with Mr. Cummings occur? Where was he when you had that conversation?
A. We came back up to the road, and I--when I asked him if he hadn't bought it from Frank, he "I assume I owned it" I said, "What do you mean you assumed you owned t? Who told you owned it." And he never answered me, just left it.
Q. Did he tell you at the time that your father had told him he owned it?
A. He did not?
Q. Did he make any statement to you or any indication to you that he had received information from your father that he owned this triangular piece of property that's in dispute?
A. He did not.
Q. What was the statement he made to you about his ownership of the property?
Mr. Summerhays: Objection, repetitious. he's said it once. It's his witness.
Mr. Kinghorn: I want to make it clear that he said it in report of the conversation.
The Court: I'll allow the question.
Q. What was the statement he made to you when you asked him who told him he owned the property?
A. Well, he assumed.
Q. He assumed that he owned it?
A. Yes.

The foregoing is against the clear weight of the evidence which is set forth as follows:

Mr. Cummings testified : (R. 001519 - R. 001520)

Q. (Mr. Kinghorn) When you had Mr. Neeley prepare this survey of your property, did you know that you were defining the boundary between yourself, your property, and the Gillmor property?
A. That I was defining it?
Q. Yes, when you had Mr. Neeley survey this.
A. Yes.
Q. You took him out there and showed him

around the property, and showed him where you thought the boundaries were?
A. Yes, and we verified it I think with the legal descriptions that were given to him.
Q. We don't know today what Mr. Neeley did other than what's in his testimony, do we?
A. I haven't recalled his testimony.
Q. So anything you might say about him verifying things is just speculation on your part; is that correct?
A. I know him or Jackson Howard.
Q. When you had Mr. Neeley survey the property, did you make any attempt to contact any member of the Gillmor Family and say, "here is where I think the boundary is, do you folks agree to that?"
A. No. Why would I do that?
Q. You took no steps when you were going on to a different legal description, you took no steps to contact you neighbors and find out--
A. No.
Q. ---If the descriptions were consistent?
A. No. I had had the property for years, and I knew where my boundaries were.
(R. 001498 - R. 001500)
Q. (Mr. Kinghorn) Prior to time you received exhibit no. 19 from Mr. Marcellin and his wife, do you recall whether or not you saw a legal description of the property you were going to buy?
A. No, I don't think I did.
Q. Was this deed the first legal description you saw for the Marcellin property you were purchasing?
A. Probably.
Q. After you received this deed, did you take it and go out in the field and try to locate any of the boundaries that are shown in this deed?
A. No, not at the time.
Q. Did you ever hand this deed to a surveyor and say, would you please go out in the field, Mr. Surveyor, and mark the boundaries of this deed, "Prior to the commencement of this case?
A. I think we gave a tax notice and the deed to Pat Neeley, yes.
Q. Do you think you did?
A. Yes, I know we gave him some legal descriptions; whether it was a deed or a tax notice or which we did give him there were some descriptions of the property.
Q. Are you prepared to testify today that you

gave this deed to Pat Neeley and asked him to go out and survey the boundaries of this property?
A. No.
Q. I'll show you what's been marked as Exhibit no. 20. Can you identify this document for us, Mr. Cummings?
A. It was a Quit Claim deed when I bought Al Pelton's interest in the ranch out.
Q. That was in April of 1965; is that correct?
A. Yes.
(R. 1505 - R. 1507)
Q. (Mr. Kinghorn) Drawing no. 5765, that's a drawing that was prepared for you by Parley Neeley?
A. (Mr. Cummings) Yes.
Q. Of what is called Treasure Mountain?
A. Ranches.
Q. Treasure Mountain Ranches, is this the subdivision that you were telling us about a moment ago that you and attorneys from Provo were planning to develop together?
A. Jackson Howard, yes
Q. Were you present when Mr. Neeley conducted the survey from which this drawing comes?
A. Oh, I was up there at times when they were working, but no, I wasn't there all the time; but yes, I was up there while they were working.
Q. Did you show Mr. Neeley the boundaries of the property you claimed so he could prepare this survey?
A. I"m sure I rode around the road and showed him what we had bought and everything.
Q. You took him around and showed him where you wanted him to survey the line for the development that you and Mr. Howard and Mr. Lewis were going to develop?
A. Yes, I showed him the ground we had bought, yes.
Q. And do you remember meeting with him down at the Old Hotel Newhouse and going up the property to take him around the property boundary
A. Possibly so, It seems like I could have met him up there, yes.
Q. After this drawing was prepared, did you have a chance to examine it? Did you look at it?
A. Sure.
Q. Did you compare the legal description of

the boundaries of this survey with the legal description of the deeds you had received from Mr. and Mrs. Marcellin?
A. No, I didn't.
Q. You never did that?
A. No, I don't know that I'd be qualified to do that' but no, I didn't that I recall anyway.
Q. The legal descriptions that appear on Exhibit nos. 7 and 8 call the legal descriptions that were performed by Mr. Neeley after he did--
A. Yes.
Q. -- the survey that's reflected on this drawing no. 5765?
A. Yes.
Q. Is that where these legal descriptions came from right off
A. I think so; yes, I think that's right.
Q. So after you had Mr. neeley prepare this new survey of the property, the survey that's shown on exhibit no. 21, You used those legal descriptions whenever you conveyed property out to buyers.?
A. This legal description is in here, yes, those are attached to the plat.
(R. 1508)
Q. (Mr. Kinghorn) Are you the one that was responsible for taking Mr. Neeley up to the property and showing him the boundaries that you wanted surveyed for development?
A. (Mr. Cummings) Jackson Howard, Rex Lewis and myself, and Pat Neeley, were there on more than one occasion together.
Q. So is it your testimony that Jackson Howard and Mr. Lewis are responsible for the boundary description on this property?
A. Well, I assumed so; they sure -
they knew where the property line was, and they sure--they did.
Q. Had they ever been up there with Mr. Marcellin to look at the property before you purchased it from him?
A. I don't Know.
Q. They were interested in the property back when you purchased it from Mr. Marcellin, were they
A. I don't know. I don't think so. I don't know.
Q. You had no contact with them when Mr. Pelton purchased it?
A. No.

Q. They would have no reason to visit with Mr. Marcellin about boundaries, would they?
A. I don't think so.
Q. They wouldn't have any basis of any knowledge to take anybody out there and say, "Here's the boundaries of this farm"?
A. Well, they--this legal description, and the fact is Jackson gave legal descriptions and that to Mr. Neeley.
Q. How do you know he was there?
A. Because I was there. I don't know whether it was tax notices or the legal descriptions off the deed, but it was legal descriptions, tax notices or deeds.
Q. What did you see him give Mr. Neeley? Was there a piece of paper with writing on it?
A. I think it was tax notices.
Q. You think it was tax notices?
A. I think so.
Q. Did you read the piece of paper that Mr. Howard gave to Mr. Neeley?
A. I think I gave the piece of paper to Mr. Jackson Howard that he gave to Mr. Neeley.
Q. Did you read it?
A. Yes, I'm sure that is was tax notices. I think it was tax notices on the ranch.
Q. But it wasn't a deed?
A. Not that I recall, I'm not sure. Maybe we gave them both.
Q. You don't remember today which of the two?
A. No, I think we may have given them both, but I'm quite sure we gave them tax notices.
(R. 35)
Q. (Mr. Summerhays) When you asked Mr. Neeley to survey this property, did you give him any instructions about how to do it?
A. (Mr. Cummings) Well, we took him around the road and showed him where the boundaries were on the road, and naturally we gave him some tax notices or the legal descriptions we got from Marcellin. Some attorneys from Provo were involved with me in that development and they were the ones that contacted Mr. Neeley on the first instance, and the paperwork and the deal was made in Howard Jackson's office in Provo.
Q. Jackson Howard?
A. Jackson Howard, yes, sir.
Q. And did he assist you in determining where those boundary lines were, in his opinion?
A. Oh, yes. He and Rex Lewis were partners with me and they had much more knowledge in

the legal matters than I did.
Q. And did you get a legal opinion from them that your title went to the road?
A. Oh, yes. absolutely.
Q. And did you, in good faith, rely on that?
A. Yes.

Mr. Neely in effect said he did not know whether he had received a legal description or not, but didn't think so because there were none in his file at the time of the file. Defendant Appellant Cummings stated repeatedly that Mr. Neely was provided with tax notices as legal descriptions. Defendant Appellant Cummings' testimony clearly is dispositive by its decisive weight, but under either scenario, there was no malice in view of the fact that it was undisputed that Defendant Appellant Cummings relied on good faith by legal opinions of his counsel that his property lied up to the road. Defendant Appellant Cummings relied on Emil Marcellin showing and telling him he owned everything west of the road (R. 32, 001521, 001497) and also Emil Marcellin had told Al Pelton the same thing that the property was of the road was what he was selling (R. 18). No one disputed this testimony that Emil Marcellin didn't tell and show both Veigh Cummings and Al Pelton the property was all that west of the road was what they were purchasing. So when Frank Marcellin asked whether he had purchased the property from Gillmors and relying upon what Frank's father Emil had told both himself and Al Pelton the reply to Frank of "I assumed I owned it" is reasonable and certainly does not reflect any degree of malice, implied or otherwise.

B.

SURVEY

THE COURT'S RULING WAS CLEARLY ERRONEOUS AND AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE THERE WAS NO COMPETENT EVIDENCE TO SHOW THAT PLAINTIFF'S SURVEY WAS CORRECT IN THAT IT WAS NOT DONE IN ACCORDANCE WITH STANDARD SURVEY PROCEDURE AND DEFENDANT'S SURVEY WAS DONE IN ACCORDANCE WITH STANDARD SURVEY RULES AND THIS SURVEY EVIDENCE SHOWED THAT DEFENDANT WAS THE OWNER OF THE PROPERTY AT ISSUE.

Marshalling the evidence shows that the acquisition deed description both defines the boundary as corresponding with Cummings' existing road and requires that title be quieted in Defendant Appellant Cummings. James West, Plaintiffs Appellees Gillmors' surveyor testified to the contrary, but his survey was fatally flawed for the following reasons:

(1) He used the partition decree's boundary line which was outside of the chain of title.

(2) There was a discrepancy between a call to a monument and the distance to the monument. He used the distance call by mistake because the Rules of Surveying require that in that situation, one must use the monument, which was the road, and had he done so, his survey would have been consistent with Kent Wilde's

(3) His survey did not close by more than 200 feet.

For each and all of these reasons, his survey must be rejected.

The Defendant Appellant herewith marshals the evidence in support of a finding that the survey by James West is the correct interpretation of the historical deeds and therefore it was correct to Quiet Title in the Plaintiffs.

The historical deeds emanate from a common grantor Charles R. and Isabell Spencer. The first deed was given to Stephen T. Gillmor on October 25, 1926 and the second to Emil Marcellin in 1931. The description to Marcellin was all the rest of the Spencer property in that area less the portion deeded to Gillmor. The portion of the deed in dispute is as follows:

> ...thence West approximately 5 rods to a point on the Easterly side of the aforesaid 6 rod wide road and at a point 3 rods Easterly from the center line of said road and at right angles thereto; thence along the Easterly side of said road and 3 rods Easterly from the center line thereof and at right angles thereto, Northerly and Westerly to a point **3 rods East from the Southwest corner to the Northwest Quarter of Section 28, aforesaid;**thence West 3 rods; thence Northwesterly on a direct line 61 rods, more or less, to the point of beginning.
> (Emphasis added)

The Partitian Decree, goes counterclockwise. The historical deeds go clockwise, the partitian decree states:

> ...thence southeasterly 1006.50 feet **more or less to the west quarter corner** of said section 28, thence east 49.50 feet, thence southeasterly along a road to a point that is 82.50 feet west of the point of beginning. thence east 82.50 feet to the point of beginning. (Emphasis added)

James West testified: (R. 001372)

> Q. Okay, tell me the legal description that you use as a basis for what you surveyed?
> A. I used the Partition Decree which is on page 33 of--
> Q. You're referring to the partition decree in the Gillmore v. Gillmore?
> A. Yes.
> Q. Who furnished that to you?
> A. Frank and Nadine Gillmore.
> Q. Did they ask you to do something when they gave you that legal description?

A. To identify their boundaries.
Q. They asked you to identify boundaries shown in the partition decree on the ground?
A. Yes

Mr. West later testified that he compared the historical deeds and the partition decree and the description were the same in the disputed area as follows: (R. 1390)

Q. We.., do you have an opinion as to whether or not the boundary line as described in this deed I just read to you are the same or not as the boundary lines you have depicted on your survey?
A. It's the same.

Mr. West's interpretation and reading of the historical deed at the point of dispute is as follows: (R. 001370 - R. 001371)

A. Thence along the easterly side of said road and three rods easterly from the centerline thereof at right angles thereto northerly and westerly to a point three rods east from the southwest corner of the northwest quarter of section 28.
Q. Can you find that point three rods west of the west quarter corner of section 28?
A. From here to here.
Q. Is that three rods, is it the 49.5 feet; is that correct?
A. Yes.
Q. So it goes along the road to a point 49.5 feet east of the west quarter corner of section 28; is that correct?
A. Yes.
Q. Where does it go from there? Thence west three rods?
A. West three rods, that would be back to the quarter corner.
Q. The west quarter corner of section 28?
A. Yes.
Q. Then from there where does it go?
A. Thence northwesterly on a direct line 61 rods more or less to the point of beginning.

(R. 001390)
Q. Why do you say those are the same lines? Is there something about this particular area that helps you fix the location of this

boundary?
A. Well, it calls out the quarter corner, the west quarter corner of section 28. This has been established and there's also evidence that this is the section line. And the fence to the south and fence to the north, it lines up pretty well, and the bearings close to the north and south as well.

West later explained why he did not use the point in the road but rather used a call which was not either in the partition decree nor in the historical deed. (R. 002088)

Q. All right. and
at a point three rods easterly from the center line of said road, is that right?
A. Yes.
Q. And at right angles thereto, is that correct?
A. Yes.
Q. And thence along the easterly side of said road. Which you did, didn't you.
A. Yes.
Q. And three rods easterly from the center thereof and at right angles thereto, northerly and westerly. Show me where you went northerly and westerly?
A. This is indicating northwesterly going west--
Q. So you went northerly and westerly along the road?
A. Yes.
Q. To this point?
A. To that point.
Q. and that says twelve inch C.M.P.?
A. Yes.
Q. What does that stand for?
A. corrugated metal pipe.
Q. So you stayed on the road until that point?
A. Yes.
Q. Why did you stay on the road until that point?
A. This is what I was -- what I indicated -- the section line. But with the section line then it went -- then it would have been a west bearing. This was on the northwest. Somewhere I had to make a cutback to the call in the deed to west of the quarter corner.
Q. And it was an arbitrary decision on your

part as to where to make the cutback and depart from the road, wasn't it?
A. I talked to Mr. Kinghorn.
Q. And he told you where to cut off of there?
A. He said that's where he -- yes.
Q. And that's why you took off from that point?
A. Yes.
Q. And how many turns had you made on that road?
A. You made four or five or six turns on that road and suddenly decided to depart from the road.
A. I had to, yes.
Q. Now, is the road a monument?
A. Yes.
Q. Is the three meter -- is the three-rod distance a metes-and-bounds distance call?
A. No. It's a part of it, it's -- metes and bounds say along a certain line. It's not-- it's just one part of the metes and bounds.
Q. Three rods is a metes and bounds, part of the metes and bounds?
A. Part of the metes and bounds.
Q. Aren't you supposed to take the road as the monument, stay on the road instead of going to the three-rods measurement, the three-rods measurement?
A. In fact it called it out, being three rods east of the quarter corner. I have to honor that, honor that corner. It's there for a purpose.
Q. Is the general rule of survey that if you have a choice you take a monument over a metes and bounds call?
A. The metes and bounds call is for along a fence or --
Q. I'm not asking that. Is the general rule that you take a monument over a metes and bounds call?
A. Yes.
Q. Is a road a natural monument?
A. Yes, it's a natural monument.
Q. Is a quarter corner an artificial monument?
A. If it's a stone--if it's an original corner.
Q. And is the rule that you take a natural monument over an artificial monument?
A. Yes.
Q. and if the road is a natural monument, sir, and you were on the road why didn't you

stay on the road instead of going to a measurement from an artificial monument? Because Mr. Kinghorn told you do to, isn't it?
A. No. Still call it out and I would have--I looked, searched that area for the original corner, could not find it.
Q. So you reset it?
A. No, I didn't reset it. Forsgren & Perkins set it. They reestablished that corner.

(R. 002016)
Q. All right. Sir, this here says the most common hierarchy of calls is as follows: one, natural monuments; two, artificial monuments; three, distances. Do you recognize that as a standard treatise in your industry and profession that correctly set forth the calls?
A. Yes, I do.
(R. 002017)
Q. All right. Now, Mr. West, this says along the easterly side of said road and three rods easterly from the center line thereof and at right angles thereto. Is that correct?
A. Um-Hum.
Q. You're still on the road at that point, aren't you?
A. Yes.
Q. Northerly and westerly to a point three rods east from the southwest corner of the northwest quarter of section 28 aforesaid. Now, that's the language you said justifies a departure from the road, is that right?
A. Yes.

Mr. West testified about the decree description not closing as follows: (R. 001412)

A. I thought you were turned around.
Q. This call here? This call here, it is a deed actually east 332.94 feet. What does that mean?
A. The deed, in the deed it calls out 82.5 fee, and to get over to the road from that line boundary, the Boundary line, it takes 300 feet or better.
Q. From the court decree?
A. Yes.
Q. So that actually didn't close, either, did it, if you just used the footage?
A. No.
Q. That was the one that you in and

corrected, gave Mr. Kinghorn a correct description and he went in and got the court decree changed?
A. Yes.

Frank Marcellin testified that the Old Ranch Road had moved to the east: (R. 001971)
Q. Mr. Marcellin, I believe you said that you were making these observations in 19-- some of the observations in 1931. When were you born?
A. I was born in 1931> I was making the observations in '33, '34., on up.
(R. 001467 -- Born in October 1931)
(R. 001971)
Q. Okay. So in "33 when you first started making the observations you were two year old?
A. Tow and a half year old, yes.
Q. Now, you say the road moved. Of course I disagree with that, but when do you say the road moved?
A. The road moved when the W.P.A. put that in, which would be in about '34 and '35 when they got it completed. And they only went to the end of where the Macori Property was.
Q. And you were three-years-old when you saw that?
A. I was four or five before they finished it. They didn't finish it in one year.
Q. It took them two years to finish it?
A. Longer than that. It was about '35, '36 when they finish that road.
Q. Two or three years?
A. Yes.
Q. Now, the old road that you say went down west of where the road is now, when did you observe that being used?
A. I used it when I went there to get the milk cows out of the north pasture, as we call it. And at that time I was--why I say, I started milking cows when I was three and a half years old. I went and herded them cattle from the field, the pasture to the milk barn.
Q. On that Old Road?
A. On that Old Road. And then it continued on to the present Old Ranch Road as they called it-- I call it the Marcellin Lane because it's easier--and then on the point Mel Flinders was saying it was rocky because it was such a bog hole, they then cut back into our own property, into our own barn yard.
Q. Now, as I understand it, you're saying the

new road was finished in about 1935. Is that correct?
A. That's the Old Ranch Road.
Q. The new Old Ranch Road?
A. Yeah.
Q. The new old ranch road was finished in "35 when you were four years old?
A. No. I was older than that.
Q. When were you born?
A. I was born in '31.
Q. In '35 how old were you?
A. I was five years old--no. four year old.
Q. Four years old. Now, when they started using the brand new old ranch road, what did the old ranch road or the old Marcellin Lane look like in terms of a road on the ground?
A. Okay. That's it was, was wagon tracks with sage brush in it.
Q. It wasn't a six-rod-wide county road?
A. No, it wasn't
Q. Do you know why the 1925 deed would say to a six-rod-wide county road?
A. I do not.
Q. But you're saying, sir, that in 1933, when you were two and a half, three, two and a half and starting to milk cows, you're certain there was no road where the new old ranch road now is?
A. That's when the W.P.A. started putting that road over that crest of the hill down into the Macori barn.
Q. And before they started putting that in there, there was nothing there?
A. There was not sagebrush.
Q. And they started putting that there in 1934, I believe you testified?
A. Roughly around in that time, '33, '34.
Q. So it may have been 1933 when you were two years old, is that right
A. I'm sure that they was working on that road prior to that.
Q. Prior to-- 1932?
A. Um-Hum.
Q. How do you know that?
A. To get the extent of the work that they had done they had to be there for quite sometime.
Q. Which you were observing by the time you were two years old?
A. I seen that when I was two. And I seen the guys that worked on that W.P.A. crew.
Q. So by 1932 they had to have been working

on the road for quite sometime. What do you say is quite sometime?
A. Possibly within that year, '32 on.
Q. How about 1931, could they have been working on it then?
A. I don't believe so because my mother and dad would have surely told me if they had of.
Q. But they were working on it in 1932, is that right?
A. Yes.

Mr. Marcellin testified at R. 001472 to the road change except he stated:

Q. (By Mr. Kinghorn on redirect after a break) Let me ask you to restrict your testimony to your recollection of the WPA crew. about how many years, what years do you recall them working on it?
A. I remember them working there for two or three years.
Q. Can you tell me what those years would be, from your testimony?
A. Roughly maybe '35, '36, '37, that era right in there, '38.
Q. Prior to that time, Mr. Marcellin, do you recall what the old ranch road or Marcellin Lane looked like?
A. It was just a wagon road.
Q. Will you tell me what you mean by "wagon road"? How wide was it What did it look like?
A. Well, it would be just enough for wagons that had a rim of steel around wooden spokes wheels with a bolster between them which, what I would say were no more than--at the most, they would be maybe eight feet.
Q. This was a -you're describing the road that had basically two tracks that were about eight feet wide?
A. Yes.

David Moore testified: (R. 001720)

Q. If I instructed you--if I hired you and instructed you to assume in your testimony that there would be evidence introduced in the trial that this fixed object, the road, had been moved by the county to the exact, and moved an undetermined distance at some point in time after the deeds were written, would it change you interpretation of this deed?

A. If I saw the evidence was--was able to determine what it is, which I haven't seen; you're asking me to give a hypothetical.
Q. That's right, I am.
A. If the road had changed, which I don't know that it has; it would change my opinion, yes.

The foregoing is against the clear weight of the evidence which is set forth as follows:

Kent Wilde interprets the same description as follows:

(R. 001765)

A. Then the deed, as we've gone over this numerous times, says that we go on the easterly side of a six-rod wide road northwesterly up to a point which is three rods east of the quarter corner.
Q. Were those inconsistent calls, in your opinion?
A. Stating it more--you mean along the road or until we went to this point?
Q. Until you where you got to this.
A. Yes, there was an inconsistency which we reached at this point here.
Q. What was that?
A. The monument of the road did not coincide with the monument of the quarter corner.
Q. How did you determine that? Did you use a metes and bounds call of the three rods to determine that there was not a correspondence?
A. Yes, and by physically finding a monument that had been set in '87.
Q. Did you disregard the three rods?
A. Where this metes and bounds was inconsistent with monument, we used exactly the same line of logic to come from the easterly side of the road to the quarter corner, which showed that it was approximately, or with reason, of what that distance would have been.
Q. What was that?
A. 238 from the easterly side, not the quarter, but from the easterly side.
Q. Was that three chains?
A. Pretty close.
Q. And again then to clarify, if you would, why you used the east side of the road instead of a measurement of the three rods.

A. As I read the deed, it states that it's tying--whoever prepared the deed, and in following the footsteps from the very beginning of the deed, he's specifically states that it starts on the easterly side of a six-rod wide road. He makes the metes and bounds to the deed until he comes to a point down here, which was the beginning point from the Gillmor property to the court proceedings, and then he ties it back to the easterly side of six-rod wide road, which is three rods east of the centerline of the road. Then it says it follows that point up to a point to where it goes west three rods east of the quarter corner.

Q. Why do you stay on the road at the call instead of going to a point three rods east?

A. Mr. Kinghorn: Objection, leading the witness. The witness didn't say that.

Q. Did you do that?

The Court: no, no. I'll sustain the objection.

Mr. Summerhays: Withdraw it, your honor. When you got to this point--and I would like you write "A" on there. Did you use that as a boundary marker on the division of the property?

A. I did.

Q. Why?

A. Because it called for the easterly side of the six-rod wide road.

Q. Why? did you use that instead of a three-rod measurement?

A. I did.

Q. Why?

A. Two reasons: One, the original stone that was set by the government land office, the original indication that anyone has used that since it was set in the late 1800's. This monument, which was set, which was correctly set by Mr. West in 1987 (sic), was a proportioning measurement. Now as we review all of the plats of the sections, and the way they were set, we find that the GLO Plat says that particularly section 28 is a short section. If we find how it actually sits on the ground, we find it's a long section. When we establish this corner, it is off of a double proportioning method, and that meas it affects four measurements. Whatever the stone is found to the east, which is the quarter corner in this case, a mile to west, a mile to

the north, and whatever stone was found to the southerly part, this is a calculated measurement to fix it in the best position that we can.
Q. When you say "this" can you mark point as "B"?
A. Yes.
Q. What is "B"?
A. It's the southwest corner of section 28.
Q. Thank you, go ahead.
A. Doing this proportioning method, and all the reference books I've studied and the classes I've attended say no way do we ever set a proposed monument in exactly the same spot as it was set by the original surveyor, but it is the best method that we have to establish where it should be.
Q. And what did you do from there?
A. So in that case, the deed was created in 1926, the historical deed, or the division of the two properties. And so since this monument was not set until '87 (sic) this physical monument here would have precedence over this one, because it was set at a later date.
Q. When you say "this physical monument here" what are you referring to?
A. The easterly side of the six-rod wide road.
Q. Is that what you were referring to as taking precedence?
A. Yes.
Q. What does that take precedence over?
A. The monument that was set in '87 (sic).
(Emphasis Added).

(R. 001765)
A. It says approximately five rods.
Q. How many feet is that?
A. 82 and one half.
Q. Was it 82 and one-half feet away from that point?
A. No.
Q. How far was it?
A. I measured 307.51 feet.
Q. How many chains is that?
A. Approximately five chains.
Q. So it said "five rods," but you went five chains?
A. No, I went to the easterly side of the existing road.
Q. Which turned out to be what?

A. Approximately five chains.

Mr. West admitted that the description didn't close but unlike Mr. Wilde he used the distance call rather than the monument which violated a primary survey rule.

Mr. West explains his interpretation as follows: (R. 001618)

> Q. And did you hear Mr. Wilde's--the interpretation Mr. Wilde placed on the calls and points and distance in the deed in the disputed territory?
> A. Yes, I did.
> Q. Do you agree with his interpretation of that deed?
> A. Will you explain to the court why you do not.
> A. He says that the point where it comes up to three rods west of the west quarter corner is in the road, he stated in the road. If that was the case, it would put a big---a bend in the section line, would not be straight through.
> Q. Do you believe there is a bend in the section line to the east?
> A. No.

David Moore testified: (R. 001681)

> Mr. Summerhays: That's good. I'm going to read from Octor v. Maw and see if we can stipulate that that's the law of Utah. October v. Maw-- I have to get my glasses here, you honor. This is the Supreme Court of Utah, a 1972 case, 493 P.2d 989, citing from page 993, a unanimous decision written by Justice Callister:
> This court has consistently adhered to the principle that a distance call yields to the monument call, the reason being that there is more likelihood of mistake in courses and distances than in calls to fixed objects which are capable of being clearly designated and accurately described.
> Mr. Kinghorn: Your honor, that's the way our Supreme Court--that fine. That's the law. I stipulate to it.
> Mr. Summerhays: Is that a rule you use in your business?
> A. Yes, the physical monument takes

precedence--or, the physical ties in a deed take precedence over bearing and distance.
Q. Are you familiar with the Learned Treatise, A Guide To Understanding Land Surveys, by Steven Estopenol?
A. Yes.
Q. What does that say about the rule you should follow?
A. It says that there is a hierarchy of monuments, the first one being--lost the word--a physical monument that is accepted as a physical monument. The second one is artificial monuments. Physical would be things such as to a river, to a road, to something that is physical, versus to monument that is artificially created by a surveyor.
Q. To refresh you memory, would it be "natural"?
A. Thank you, natural monuments.
Q. That's the first hierarchy?
A. The first rule is you go to the natural monument, if it isn't stated in the deed, no matter what the bearing and distance are.
Q. Is a road a natural or artificial monument?
A. Natural.
Q. Why is that?
A. They're used for long periods of time. Once they're created, they generally don't change location without some type of condemnation action.

(R. 1687)
Q. Now where did Mr. West use as his point?
A. He used the west quarter corner as his tie point and leaves the road.
Q. Measured three rods?
A. He leaves the road and measures to a point three rods east of the west quarter corner, and he adds in a course to ge there.
Q. That's not in the deed?
A. It's not referred to at all in the deed.
Q. Was that correct practice?
A. No.
Q. Why?
A. It's not consistent with the historical legal description. The historical legal description says, you know, you're going along the road; it doesn't say you're leaving the road. So this point has got to be on the road, wherever it comes up here.
Q. That's the monuments rule?

A. Yes, natural monument is to stay on the road.
Q. What's the next call?
A. Thence west three rods, thence northwesterly on a direct line 61 rods more or less to the point of beginning.
Q. Where would that take you?
A. A three-rod job here and you go straight.
Q. Now how wide is the road at this point?
A. six- excuse me, six-rods wide. We're on the east side of it.
Q. If you go-- if it's six-rods wide, and you go west three rods, where are you?
A. the center of the road.
Q. And then you go straight to the point of beginning?
A. Yes, in a straight line.
Q. Is that where the road is now?
A. Yes, it is.
Q. Along here to this point. Here you do a jog, and then you go straight back to the point of beginning.
Q. Now where does Mr. West use as a line?
A. He's on the road to a point somewhere south of the quarter section line and then he intersects a line that goes to a point three rods east of the west quarter corner.
Q. Is that a diagonal?
A. Yes.
Q. Is that anywhere in that description?
A. No.
Q. Then where does he go?
A. He goes to the west three rods, three rods to the west quarter corner, and then he goes on north, a straight line back to the point of beginning.

(R. 001698)
Q. What's the difference between that legal description and the legal description--strike that. Are all other legal descriptions in the chain of title the same with respect to this boundary line other than the partition decree?
A. Prior to the partition decree, they used the same legal description, yes.
Q. Yes. Now what's the difference between those prior to the partition decree and the partition decree?
A. The first difference is that it ties to a different section corner, ties to--whoever prepared it ties to the southwest corner rather than the northwest corner, and it goes

> are clockwise versus counterclockwise. But it makes--you know, the obvious difference is it makes no reference at all in the deed to the road.
> Q. And that's the document by Gillmor got his title?
> A. Yes
> Q. Now if there's no reference in the deed to the monument, but only metes and bound description, what is the proper way to survey it?
> A. Tying to the--you know, using a metes and bounds legal description, and ignoring any reference to a road, if you're relying totally on the partition decree.
> Q. Is that what Mr. West has done here?
> A. In my opinion, yes.
>
> (Plaintiff's exhibit one also contains an amended partition decree that was filed in May 20, 1993 which does have ties to the physical monument the road.)

Mr. Marcellin testified that the road had moved, which in observed when he was 2 or 2 1/2 years and that the work was completed by the time he was 4 or 5 years old. The following people who lived in the area and travel the road state the road to the best of their knowledge is in the same place now as it was in the '20's and '30's.

Jim Sorenson who was born on January 1, 1914 (R. 001837) states: (R. 001837)

> Q. And have you been familiar with that area since then?
> A. Yes
> Q. And have you had occasion to become familiar with old ranch road?
> A. Well, I haven't used it daily, but I used it at times daily. I hauled milk on it in '34,'35. from the ranchers over there, Marcellin's
> Q. And were you about nine years old when you moved up there?
> A. Yes.

Q. And have ;you been familiar with old ranch road as it runs north and south since that time?
A. Yes.
Q. Are you familiar with where it is now?
A. Yes.
Q. And did you have an occasion about three weeks ago to go look at this again with Mr. Cummings?
A. Yes.
Q. And to your knowledge is the road in the same place that it was in when you moved--
A. Yes
Q. Has it also always been in the same place?
A. Yes, sir.

(R. 001840)
Q. Was there ever a time that you remember in the '30's when there were W.P.A. crews out working on the Old Ranch Road?
A. Yes. i remember them working there, but the exact date I don't know.
Q. Okay. In '34 and '35 do you recall the condition, the size, so forth, of the road, what is looked like? Do you remember what it looked like?
A. We.., it's similar to what it is now, the sides of the road. Only it was gravel then and not paved.
Q. Okay. Was it as wide as it is now?
A. Well, the place now has been widened out, but generally it's the same, yes.
Q. So you're saying it's about the width now as it was in 1934 and '35
A. yes.
.....
The witness: Well, that--I wouldn't know sir> I do know where the road was all my time and I know it's the same as it is now.

(R. 001843)
Q. You don't remember the W.P.A. having made any changes in the road?
A. Not in a place that's in question, no.
.....
Q. Well, I guess I wasn't to make sure you understood the last question I asked. What I asked you was whether or not you would recall today if there had been some changes made by the W.P.A. crew on the road north of Marcellin's place. Do you think you would remember that clearly today?

A. No, I wouldn't.

Frank Marcellin disagree with the testimony of the of Jim Sorensen (R. 137) and stated that Sorenson never pick up milk there in '34 and '35 and that Sorenson was no correct that the road never moved. Marcellin is testifying that he believed that in '38 the train stopped running the milk and after that Al Harris picked up the milk. The area of time which Marcellin says in believe something happened and the fact that Sorensen clearly stated that it was '34 and '35 when he picked up the milk because the train had stopped, the critical time as to whether Marcellin actually remembers whether a road moved when he was 2 1/2 years old and his memory for the period of time when he was 3 and 4 and does remember someone makes his ability to actually know whether the road moved or whether his impressions of his early years on the ranch are clear enough to make that firm stand.

Blaine Bittner testified as follows: (R. 002072)

> A. When I was born on the ranch right there in Parley's Park, and we would call it that. I was born in 1916.
> Q. You were born in the ranch?
> A. I was
> Q. And you grew up around Old Ranch Road?
> A. Yes.
> Q. I'm referring to Exhibit no. 31, which is a section of old ranch road. This is where the Garlick home is.
> A. I don't know. I've never heard of the Garlick, in fact.
> Q. Are you familiar with the entire Old Ranch Road as it runs north and south?
> A. We can go around there infrequently around that way.
> Q. To your knowledge, is Old Ranch road the same it was as you were growing up?
> A. It's never changed that I know of, except when the WPA was there, why, they widened it

in a place or two.
A. They didn't move the road?
Q. The road was never moved as far as I know.

(R. 002074)
Q. Good. The specific area that's in dispute here is an area down where this red mark is. I'm going to ask you if you remember Emil Marcellin.
A. Yes, we were friends with Emil.
Q. do you know Frank, His son?
A. I know Frank.
Q. do you see the Marcellin Place on the Aerial Photo?
A. Well, I assume that that --it would be down in here, wouldn't it? I can't tell from the aerial map. I'm not familiar with it.
Q. Let me represent to you that this group of barns and building right here is the Old Marcellin Place right here.
A. This is Ranch Road here, then?
Q. Yes, this is Ranch Road there. And as the road went around, do you recall the condition of Old Ranch Road as it went past the Marcellin Place and went north up towards you place in about the 1930's?
A. It's never changed. It's always been there.
Q. It's always been there. Do you remember what it looked like in the ----the 20's and 30's?
A. The barn and the house was just below the road a ways.
Q. What did the road look like?
A. Just a county road.
Q. How wide was it?
A. I couldn't say.
Q. Do you remember a time when it looked like a couple of wagon tracks where people--
A. No, no, it was wider than that mostly.
Q. in the '30's?
A. Yes, they started coming with a grader and so on.
Q. do you know when they started doing that?
A. I don't know; about 1925 I imagine.
Q. Did you ever remember a WPA work crew coming in and working on this section of Old Ranch Road?
A. They worked on it. We gave them so much ground to kind of widen it out.
Q. Why did you give them ground?
A. We.., did you give them ground?

A. We.., we joined up in here, we joined Ranch Road we had a 120-acre meadow in there.
Q. When they widened it out, did they straighten it out a little bit so it ran straighter?
A. Not that I know of.
Q. Not that you know of. Do you know any other work they did down here north of the Marcellin Place/
A. No, not exactly.
Q. You don't remember any of the work?
A. No. But they put them posts in is the main thing they did, and that was to furnish work for the WPA.
Q. What Posts?
Q. Cedar posts.
Q. What were they marking?
A. Well, they put them in place of the Old ones.
Q. Fence posts?
A. Fence posts.
Q. Did you see them put fence posts in along the Marcellin Property?
A. I think they went clear along there.
Q. Do you know whether they made any changes in the road down here around the Marcellin Property?
A. No, no changes that I know of.
Q. Would it surprise you if I were to tell you that Frank Marcellin recalls watching them make changes in the road amount there place?
A. **Yeah**. I can't refute him because he lived there.

Frank Marcellin on pages R. 001968 and 001969 stated that he disagreed with Mr. Bittner that there were no fences along the road and the road never moved. It should be noted that Mr. Bittner stated that the road work started around 1925 on Old Ranch Road and he would have been nine or ten years old. This was one year prior to the original deed to Stephen Gillmor from Charles Spencer. It would seem apparent that the drafter of the deed were referring to the road that was present and that widen and up grading work on began on. Mr. Bittner when asked it would surprise if Frank

Marcellin said the road moved (when he was 2 1/2 to 4 years of ages), Mr. Bittner stated Yeah. But also added that Frank was living there so he would not refute him. It should be pointed out that Mr. Bitter was seventeen when the events were happening as Mr. Marcellin described whereas Mr. Marcellin was only 2 1/2 to 4 years of age.

David Loertscher testified: (R. 002042)

> Q. Have you become familiar with the property along the Old Ranch Road during your life?
> A. Absolutely.
> Q. What years did you become familiar with it?
> A. I went to work there at the age of 15 in 1925.
> Q. Where did you work?
> A. I worked on what's now known as the Buehner property. The barn's still there. We went there to milk cows.
> Q. And were you familiar with the Old Ranch Road in its entirety and length at the time?
> A. That's right.
> Q. Will you describe what kind of road that was?
> A. Well, it was just more or less a road through the sagebrush for farmers. There were three Dairy Farmers there that had to haul their milk to the railroad either over in Snyderville right up in there or down Kimball's Junction.
> Q. When did you last look at the road?
> A. This morning.
> Q. And do you recall and have a recollection of where that road was in 1925?
> A. It is the same place.

(R. 002049) Mr. Kinghorn: Thank you, your honor. I appreciate that. Mr. Loertscher, would it surprise you if I were to tell you that Frank Marcellin recalls, as a boy, watching a WPA crew fix that road over by his father's place, take it out of the swamp a little bit, move it up on the side of the hill, and re-route it up over the side of the hill; not very much, but just enough to get it out of the swamp? Would that surprise you if

I told you that?
A. I don't recall that, if they did, because I didn't go along with them. By that time I was up on snow Summit Ranch.
Q. So you were in another part of the area?
A. Well, I was up closer to Park City.
Q. So if they were working down there on that, and made a slight change in the road, you may not have been aware of it; is that fair to say?
A. If they did, I never noticed it, because when we would to Coalville--and in fact later on, when I became a county commissioner up there--we always travelled that way to go, so I never had been aware of any changes in the road.

(R. 002051)
Q. Mr. Loertscher, that road moved, and I think you were referring up on top of the road; did you mean the Old Ranch Road moved when you said that?
A. It was still the county road.
Q. But Old Ranch Road along the Marcellin Place, is that what you were referring to?
A. It's still the same road.

Of course Mr. Marcellin on page R. 132 stated that he also disagreed with the testimony of Mr. Loertscher testified that he was 15 in 1925 (R. 002042) when he moved to the area and would have been in his early 20s when Mr. Marcellin who was 2 1/2 to 4 years of age when he observed the road moving.

Mr. West has demonstrated that he made some assumptions that were not in the deed. If there was ever a monument showing the location of the west quarter corner back in 1926, it apparently no longer exist. Mr. West therefore set about to locate the corner on his own. Using the best and latest of surveying techniques and instruments and using the "double proportioning method," he located this point considerably west and a little north of where the of where the deed description says it ought to be in relation to the

road. By his own admission surveying is currently much mere precise, so it should not have come as any great surprise that his location of the quarter corner may have differed from where it was thought to have been over 60 year prior. Mr. West also admits (R. 001412) that the first call to the road further south was 333 feet instead of the 82.5 feet stated in the deed. Also by his own admission, (R. 002016) surveying standards require that when there is a discrepancy between a distance and an existing monument (the road), the monument controls, not the distance.

Mr. West now ignores this surveying standard, and the language of the deed as well, and creates a wholly new "point" (R. 002008) west of the road and 3 rods east of his newly located quarter corner. Mr. West, upon advise of Mr. Kinghorn, (R. 002009) manufactures a new segment of boundary, over 174 feet long on a new course and distance west and a little north from the road, by drawing a line from the point east of the road to his new point. the new course along with the ignoring of the surveying standards on monument verse distance, the entire dispute rests. It is important to note that there is no such segment in the deed. In fact the first and only document in which this course and distance ever appears i the new description to plaintiffs' property prepared by Mr. West for the Order Granting Motion to Correct Clerical Error in Judgment and Decree of Partition filed by Mr. Gerald Kinghorn and dated May 20, 1993. The new segment states as follows:

"thence south 72 degrees 01'40" E 174.11 feet."

Mr. West was called upon to testify as to whether or not the

call, at the disputed point in question, was to the quarter corner as he claimed, in the historical deeds, or whether it was along the road, his testimony was inconsistent, but he finally admitted that there was no support for a new call to the west quarter corner or the west boundary line. The record at page 1410 Mr. West testified as follows:

> Q. So as far you are concerned, when you got to the word "Northerly and Westerly," you had to stay on the east side of the road.
> A. It calls out to a point, to a point.
> Q. On the road.
> A. It doesn't say "on the road," it says, "to a point 3 rods east from the section corner."
> Q. But aren't you still going Northerly and Westerly along the east side of the road 3 rods east of the center line.
> A. **Yes, I am.**
> (emphasis added)

Therefore, there is no evidence to support Mr. West for making an extra call to divert down to the west quarter corner which created the new boundary segment in the survey of Mr. West.
The weight of the testimony given during the trial showed that the evidence supports that if the clear language of the deed is given effect, the entire controversy disappears. The property boundary in dispute runs straight down the middle of the existing road, which is exactly where Mr. Cummings was told that it went by Emil Marcellin, his grantor.

The Plaintiffs Appellees tried to support Mr. West survey with the testimony from Mr. Frank Marcellin that the road had moved, which he observed at the age 2 1/2 years of age. The weight of the testimony of Mr. Leortcher, Mr. Sorenson, and Mr. Bittner who were much older when this supposed road move occurred in 1931 to 1935

but they testified that to knowledge the road is still in the same place now as it was then.

The creditability of the survey of Mr. West should have been rejected based on the weight of the testimony of Mr. Wilde and Mr. Moore and the adherance to the Standard of Surveying practices to ignore a distance call when there is a controversy with a monument.

C.

ACQUIESCENCE

THE COURT'S RULING WAS CLEARLY ERRONEOUS AND AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE THE DEFENDANT PROVED THE ELEMENTS OF BOUNDARY BY ACQUIESCENCE AND THERE WAS NO COMPETENT EVIDENCE INTRODUCED TO REFUTE THIS PROOF.

There is no evidence in the record whatsoever to contradict Defendant Appellant Cummings' testimony that he occupied the property up to the road since at least 1964, a period of over 20 years prior to commencement of this action.

There is also no evidence in the record to contradict the following testimony of Defendant Appellant Cummings and numerous other witnesses:

(1) That Mr. Cummings had fenced off the property prior to 1964, with the fence running parallel and close to the road.

(2) That no one had complained about his occupancy of the property, the fence he had constructed or his resale of the property to others who had occupied it at any time from 1964 until the filing of the complaint in this action.

Under these circumstances, Defendant Appellant Cummings should not be required to marshal evidence that in the opinion of Defendant Appellant Cummings' counsel does not exist. If any such

evidence does exist, Plaintiffs Appellees Gillmors should point to it in their brief.

Typical of the testimony of seven witnesses provided by Defendant Appellant Cummings is the testimony of Alan Pelton. Alan Pelton testifies on page 16 lines 6 through line 1 on page 17 of the 2:00 p.m. session on February 17, 1994 as follows:

> Q. (Mr. Summerhays) Is the property which is on the west of the Old Ranch Road?
> A. Right
> Q. Now is the Old Ranch Road at that location, on the east of the Marcellin Property that you purchased, changed its location since the year 1961?
> A. No, sir.
> Q. At the time you purchased the property, was there a fence immediately to the west of the property running--immediately west of the road running north and south?
> A. Yes, sir.
> Q. Would you describe the fence for us?
> A. Well, it's a pretty normal barbed-wire fence.
> Q. Post and barb wire?
> A. Right.
> Q. Do you know what that fence did at the location, what purpose it served?
> A. Well, the Marcellins had a dairy farm there, and his cattle grazed inside that fence.
> Q. Grazed up to the road on the fence?
> A. Right.

also on page 18 lines 25 through page 19 line 15:

> Q. (Mr. Kinghorn) Do you remember and specific conversations with Mr. Marcellin about where the property corner was located?
> A. (Mr. Pelton) Yeah, he--the fenceline of his property line is what we understood.
> Q. Right up there. Did you notice the fenceline was down off the edge of the hill?
> A. I don't quite understand you. Do you mean down off the edge of the hill?
> Q. Did you see up there in the corner of the property that the fenceline and the corner line were just down off the edge of the hill?

A. The fenceline ran right along the west side of the road.
Q. How far up did it go along the road from his farm house?
A. Where it does now.

Parley M. Neeley testified on (P.46 lines 22 through 24 and page 48 lines 9 through 18)

Q. (Mr. Summerhays) Did you observe any fence going along the road when you surveyed it?
A. (Mr. Neeley) There was a fence along the road, Yes.
Q. (Mr. Kinghorn) I'm going to have him do that. Mr. Neeley, did you see any other fences outside in this field that you were surveying that's depicted on 31 in addition to the fence that you have drawn there?
A. No, with the possible exception of fences, corral fences where homes are in this area.
Q. Did the fence extend across what has been shown here as the road or right of way?
A. Yes.

Blaine Bittner testified: (page 54 lines 19 though to page 55 line 5)

Q. (Mr. Kinghorn) You don't remember any of that work?
A. No. But they put them posts in is the main thing they did, and that was to furnish work for the WPA.
Q. What posts?
A. Cedar posts.
Q. What were they marking?
A. Well, they put them in place of the old ones.
Q. Fence posts?
A. Fence posts.
Q. Did you see them put fence posts in along the Marcellin property?
A. I think they went clear along there.

Ron Hanney testified: (page 100 lines 6 through page 101 line 1)

Q. (Mr. Kinghorn) This old fence ran considerably west of the road from the point right next to the road down to where it was

considerably west?
A. As I remember that, the fenceline runs pretty close to the road, but I can remember as this amount of snow that was built up in that would deep crushing down that fence--.
Q. The Old Fence?
A. Yes.
Q. Was that old fence, it went down and went west of the Garlick House?
A. No, it did not. It stayed up next to the road.
Q. I'm talking about the old fence.
A. That's what i'm talking about.
Q. What was the fence you're talking about that went west of the Garlick House?
A. If I said anything about west of the Garlick house, it was--that fence, as I said right at the very beginning, was right along the Old Ranch Road.
Q. My Question was: did you see another fence, and older fence?
A. No, I did not.

Mel Flinders testified: (R. 001575 lines 21 through R. 001576 line 2)

Q. (Mr. Kinghorn) Do you know where that fence was with relationship to this stream in this disputed area?
A. (Mr. Flinders) As I stated, yes, sir.
Q. What's your recollection of the location of the fence between the stream and the road along that disputed area?
A. It was as it is now.
Q. As it is now. Okay. And it's your testimony that as far as you know that's a livestock fence to maintain and keep in livestock?
A. Yes, sir.

Veigh Cummings testified about the fence as follows: (R. 001581 lines 9 through 17.)

Q. (Mr. Summerhays) Was there a fence along the west of that road running north and south?
A. (Mr. Cummings) Yes. There has also been fences on the west side of that road.
Q. Running north and south?
A. Yes, north and south.
Q. How far west of the road were those fences

when you were driving the milk route?
A. Oh, 30 or 40 feet from the center line.

(R. 001587 lines 8 through 25)

Q. (Mr. Summerhays) From that year of 1961, when you bought the property, till this litigation was filled in 1987, December 1987, did the Gillmors or anyone else ever come to you and say you don't own that disputed property?
A. (Mr. Cummings) No. No one ever questioned my ownership to that property west of the Old Ranch Road.
Q. And prior to your sales to those individuals, did you occupy and use the property up to the north-south fence on the west of Old Ranch Road?
A. Yes.
Q. And was that the boundary line that you assumed was the east boundary of your property?
A. Yes. I knew it was the east line of our property.
Q. Did anybody ever interrupt your use of that property?
A. No, no.

(R. 001606 lines 1 through 21)

Q. (Mr. Kinghorn) Mr. Cummings, did you ever build any new fences on this property in the area--I'm just going to restrict my question to the area that's shown on exhibit 31 as begin the area across the frontage of lot one, and I think this is lot nine, the Garlick property.
Did you ever have anybody build any fence along there?
A. (Mr. Cummings) No. repaired fence, but no new fences.
Q. Did you ever have anybody build any new fences?
A. No, not that I know of.
Q. Specifically, you never had anybody take down an old fence that was down around the base of the hill there?
A. No. I don't recall any fences in the area, other than fences going west.
Q. You never had any fences removed? Is that correct?
A. No. I don't recall ever having any fences

removed.

Veigh Cummings also testified as to events concerning the watering of sheep which were run on the Gillmor property by Steven T. Gillmor, Jr., who's father was the original deed holder of the Gillmor property, cousin of Frank Gillmor, Jr., Steven T. Gillmor died in 1988, as follows: (R. 001525 lines 1 through R. 001526 line 6)

> Q. (Mr. Summerhays) What hill?
> A. (Mr. Cummings) The hill to the east of the property that the Gillmor's owned. There was their east side of the Old Ranch Road, of this blue-green line.
> Q. Right where your hand is?
> A. Up through that area. They owned all that ground. In fact, I even helped Steve raise tow lower barbed wires and tie them up so his sheep could go into the creek and back out as an accommodation to him, at no cost. In fact, they went down 5200 north and--.
> (Kinghorn) Objection to anything Steve Gillmor said 30 years ago as being complete hearsay.
> The Court: I would sustain.
> Q. What was, confine your testimony as to what was done.
> A. The sheep went into the creek and watered on one occasion. They went down 5200 North and watered down there and grazed in 5200 North, which I didn't oppose. I mean we've got them out, no problem.
> Q. Would you tell us about what you did about the barbed wire fence.
> A. We raised two bottom wires up so they would be high enough so the sheep could go underneath it and travel to the creek, then back up onto the hill and graze.
> Q. You let him do that?
> A. Sure.
> Q. Why did you let him do that?
> A. Because he was my friend.
> Q. Did he ever do that when you--at anytime except when you gave him permission?
> A. No, he wouldn't do that.

Frank Marcellin is the only person to testify that the fence

was not along the west side of the road when Cummings purchased the property. Frank Marcellin did testify that from 1964 on, there was a fence along the road. Frank Marcellin testified as follows: (R. 001979 afternoon session lines 2 through line 5)

> Q. (Mr. Summerhays) Now, you are clear in your mind that a fence was there along the west of old ranch road by 1964, directly west?
> A. (Mr. Marcellin) That I know, yes.

Veigh Cummings also testified: (R. 001875)

> Q. (Mr. Summerhays) All right. and if the disputed property--did the disputed property lay partly over 5200 north?
> A. (Mr. Cummings) Yes.
> Q. And When approximately was 5200 North Built?
> A. Sixty-five.
> Q. And to your knowledge was there road traffic over that since then?
> A. Ever since, yes.
> Q. Have you ever heard or had any complaint about road traffic over that road since then?
> A. no.

The leading Supreme Court opinion that most recently summarizes the history of the law in Utah concerning boundary by acquiescence is Van Dyke v. Chappell, 818 P.2d 1023 (S.Ct. Utah 1991). The elements of boundary by acquiescence as stated in Chappell are:

> (1) Occupation up to a visible line marked by monuments, fences, or buildings,
> (2) Mutual acquiescence in the line as a boundary,
> (3) For a long period of time,
> (4) By adjoining landowners.

The testimony at trial was undisputed that since Defendant Appellant Cummings purchased the property he or his successors have occupied up to the Old Ranch Road for twenty-seven (27) years. The

road had always had a fence on the west side of the road congruent to the Cummings property. The preponderance of the evidence at the trial was always a fence on the west side of the Old Ranch Road. Frank Marcellin even testified of the fence being there after 1964, except for part of a year when the fence was replaced with a different type of fencing (according to Mr. Frank Marcellin). Cummings testified that he occupied up to the road which was fenced. Defendant Appellant Cummings testified that Stephen T. Gillmor, Jr., the son of Stephen T. Gillmor, Sr., watered the sheep he ran on the property. Cummings also testified that no one from the time he purchased the property until the filling of the litigation ever disputed his ownership of this property.

The Utah courts have long recognized boundaries marked by fences, walls, buildings, gravel driveways, cement driveways and rivers as monuments which establish a boundary line. 1975 Utah Law Review: 221; 226.

There is no dispute that the existing county road and the fence on the west line of the road are sufficient visible monuments for purposes of boundary by acquiescence. The most credible evidence establishes the existing road as the common boundary beginning in 1926, the date that the portion east of the existing road was deeded to Stephen T. Gillmor, Sr., Plaintiffs Appellees Gillmors' predecessor, by the Spencers, the common grantors. That was 62 years before Gillmors filed suit in October of 1987. Even if credence were given to the testimony of Frank Marcellin, that a portion of the road was changed somewhere between 1931 and 1935,

this shows that the monument in existence for more than 50 years before Gillmors filed suit in October 1987.

Cummings purchased the Marcellin ranch in 1960 taking title in 1961. At least seven witnesses testified that a fence was along the west side of the Old Ranch Road during the period of time when Veigh Cummings purchased the Marcellin property.

Defendant Appellant Cummings testified that he ran cattle on the land from the date of his acquisition in 1961 and even subdivided part of the land in the disputed area up to the west line of the road in 1965. (R. 001505). In 1965, a road was built as part of the subdivision, which was an improvement to the west, (now called 5200 North) over which a right of way was dedicated that included the parcel Gillmors are claiming. Three houses and other improvements have been erected by subsequent purchasers from Cummings who have been in continuous occupation up to the west line of the road to the present. In King v. Fronk, 378 P.2d 893 (S.Ct Utah 1963), the placing of a mortgage on the property was considered sufficient evidence to raise an inference of occupancy. Therefore, subdividing, building a road, granting a right of way and selling lots should be considered paramount acts of occupancy. Thus, there is clear and irrefutable evidence in the record that the land up to the road has been occupied for at least 27 years between the time that Cummings purchased the property and the date when Gillmor's first claimed an interest in the property by filing their complaint in October 1987. There is evidence that there was occupancy by the Marcellins prior to 1961.

Cummings testified that Stephen Gillmor, Jr., the son of the Gillmors' predecessor who ran the Gillmor sheep business on the Gillmor property, and the adjoining landowners for the time that Cummings and his successors occupied the land, sought permission from Cummings to cross under fences, and over the land Gillmors are claiming, to water sheep. In Van Dyke v. Chappell, supra asking permission to use the land in question was considered evidence of acquiescence.

Mr. Kinghorn said in his closing statement: (R. 002187 lines 19 through R. 002188 line 10)

> Your honor, I want to turn quickly, while we're here, and while I remember it, to this point on the mutual acquiescence. Mr. Summerhays mentioned that Steve Gillmor had come down and made an agreement with Mr. Cummings to go through the fence and water his sheep.
>
> Your honor, Exhibit No. 2 contains the deeds in the chain of record, and Stephen Gillmor, according to his estate documents, which are one of the documents in the chain of title, Stephen Gillmor died prior to 1934, and his estate was probated. The only Stephen Gillmor that owned any of this property in dispute at any time died prior to 1934, prior to the time Mr. Cummings ever came along or ever testified about it.
>
> That physical evidence, that's documentary evidence in the record. There's no evidence in the record of Stephen Gillmor owning one tiny piece of this proeprty from 1934 forward after Stephen T. Gillmor's estate was probated.

Mr. Kinghorn was mistaken in this position in that Defendant Appellant Cummings was clearly referring to Stephen T. Gillmor, Jr., who died in 1988, not Stephen T. Gillmor, Sr., who died in 1933. This was confusing to the Court and resulted in material

error in the testimony. Stephen T. Gillmor, Jr., was a director of Wool Growers and a friend of Veigh Cummings. Stephen T. Gillmor, Jr., was in the chain of title as is evidenced in Plaintiffs' Exhibit 1. Mr. Kinghorn used this statement to lessen the credability of Defendant Appellant Cummings.

Cummings also testified that no one ever complained about the fence, the subdivision, the houses and improvements erected by Cummings' successors, or the 5200 North road at any time until Gillmors filed suit. The comments of the Supreme Court in Hobson v. Panguitch Lake Corporation, 530 P.2d 792 (Utah 1975) are instructive regarding failure to raise any objection to improvements:

> The very reason for being of the doctrine of boundary by acquiescence or agreement is that in the interest of preserving the peace and good order of society the quietly resting bones of the past, which no one seems to have been troubled or complained about for a long period of years, should not be unearthed for the purpose of stirring up controversy, but should be left in their repose.

The other element of boundary by acquiescence is the requirement of occupancy for a long period of time. The rule is now well established in Utah that twenty years is generally considered to be a sufficiently long period of time to establish boundary line by acquiescence. Staker v. Ainsworth, 78 P.2d 417 at 420 (Utah 1990).

In the Hobson case cited above, the Supreme Court stated at 530 P.2d 795:

> The question as to just what length of time is required has been discussed a number of times.

> Particularly in the case of King v. Fronk. Justice Henriod, speaking for the court, pointed out that the statutory period of seven years for establishing ownership by adverse possession mandates the common law requisites of open, notorious, continuos and adverse possession, and also requires that the property be fenced or enclosed and the taxes be paid thereon. But, there are no such requisites for establishing boundary by acquiescence. It was therein pointed out that there is no exact time requirement; and that it may depend upon the circumstances of the particular case. But the opinion reaffirms the view that there must be some substantial long period of time and states that it is generally related to the common law prescriptive period of 20 years; and only under unusual circumstances would a lesser period be deemed sufficient. [Emphasis added, Footnotes deleted].

The testimony is unrefuted that Cummings occupied up to the road and a fence running parallel to and immediately west of it for over twenty years prior to the filing of the complaint. The Gillmors and their predessor did not complain to Cummings nor assert any ownership interest in the disputed property until October 1987. Charles F. Gillmor, Jr. received the title to the property in a partician decree in May of 1981. This was his inheritance from his father.

Therefore, it is clear that Defendant Appellant Cummings has established title to the property by adverse possession and the lower court's ruling to the contrary was clearly erroneous and should be reversed with instructions to the lower court that title to the disputed property be quieted in Defendant Apellant Cummings. This is so clear from the record that costs and attorneys fees should be awarded to Defendant Appellant Cummings.

D.

EVIDENCE OF VALUE

THE COURT ERRED IN REFUSING TO ADMIT EVIDENCE OF VALUE OF THE DISPUTED PROPERTY.

The Trial Court erred when it declined to admit Dale Jackman's appraissal or his testimony of the value of the land in dispute. See case cited under Issue E.

E.

OFFSET

THE COURT ERRED IN REFUSING TO ADMIT EVIDENCE OF AMOUNTS PAID IN SETTLEMENT BY THE TITLE COMPANY. DEFENDANT IS ENTITLED TO AN OFFSET FOR THESE AMOUNTS.

The trial Court erred when it declined to admit evidence of amounts paid in settlement tp Plaintiffs Appellees Gillmors by the title company. Utah law does not allow such a result but rather requires two things in compensation cases.

1.) That no party make a double payment.

2.) Each party pay their appropriate pro rata share of the compensation.

Cruz v. Montoya, 660 P.2d 723 (Utah 1983).

Utah Code Ann. §78-27-40(2); 18 Am Jur 2d § 24, 25, 27.

Therefore the court should either order a new trial on the issues or award an offset of $38,000 against the judgment.

F.

ADVERSE POSSESSION

THE COURT ERRED IN REFUSING TO ADMIT DEFENDNAT'S EVIDENCE OF

ADVERSE POSSESSION.

The court erred when it refused to allow testimony during the trial that would prove Adverse Possession of the property by Cuumings. The record states as follows: (R. 002054)

> If it's in there, I think we ought to read it. But by inference--and we omitted to restate it here, if we did, that's an oversight, which we should not be bound by. But I think we have raised it by inference, and their pleadings, I think the pleadings raise that issue. They say that, "We've occupied the property for a long period of time," and so in fairness and liberality and in the construction of the pleadings, it would certainly allow us to raise it at this time.
>
> And if I'm not through today--how late are we going to continue this for? I don't know that, but he certainly has a chance to go illuminate the issue, and this is the only issue before the court on that question, your honor.
>
> And frankly I admit I have a difficult burden of proof, but I have the county recorder, the county assessor coming in here this morning ready to proffer proof regarding who has paid the taxes and who has paid the taxes might be the hard part.
>
> Now it looks like that Mr. Gillmor, from the evidence I have, and I'm making a proffer here, has paid the taxes since 1984 when he filed a copy of his boundary line by acquiescence. So that--I;m sorry, his partition decree, the description in the county recorder, and after that was filed in '84, the county assessor and the county recorder set forth in the description that was sent out in the tax notices this disputed strip according to the partition decree deed. So I have to admit that since '84, Mr. Gillmor has also paid taxes. So if I can--.
>
> The Court: Have both of them paid it?
>
> Mr. Summerhays: They've both paid it. The statute says that My client has to pay all the taxes that are paid, so I have to establish my case by showing that my client was the only one that paid it before 1984. (R. 002064)
>
> The Court: I'm not persuaded by the

> testimony of Mr. Spriggs that he was--he or his deputy were subpoenaed or requested specifically to come to the testimony concerning adverse possession. I think it would be surprise to Mr. Kinghorn in the case, and I think it is raised in the issue was pointed out in the in the initial pleadings, but it is not raised in the answer. This is the first--the court remembers having discussed this, and I have been at pre-trial, and I know at least once we discussed it and maybe more than that in this case, but this is the first I remember. But of course I could easily have forgotten it. I would readily admit that.
>
> But adverse possession was not anything that was discussed at the first hearing. I know that my decision in the first hearing did not have anything to do with adverse possession.
>
> Mr. Summerhays: Of course that was because we hadn't put our case on.
>
> The Court: I understand that, but nothing was said concerning that, and I think for me to allow you to raise that at this time would be prejudicial to the plaintiff's case, that the only way I would do that is if the case was in such a nature that he had sufficient time to rebut anything and I don't know where we're going as far as our evidence today.
>
> What I'm saying right now is that I'm denying your request. If the case does have to go on and on, then I would possibly entertain a renewed motion from you as to opening it, and we would have to take up evidence to rebut it.

Both the witness list for the August part of the trial and the witness list for the February trial both listed Allan Spriggs from the recorders office and the February list also list A person from the County Assessor office to testify. The question of adverse possession was not new to this case. A Summary Judgement in favor of the Defendants was reverse and remanded by the Utah Court of Appeals on February 22, 1991 on the issue of Adverse Possession.

It was remanded to clear up the question of who paid all of the taxes.

This issue was by mean no surprise to the Plaintiff and could not have been prejudicial to them if the testimony and the issue had been testified to during the trial to not allow it has been prejudicial to the Defendant Appellant Veigh Cummings.

G.

SLANDER OF TITLE ON THE COUNTERCLAIM

THE DEFENDANT PROVED THE ELEMENTS OF SLANDER OF TITLE ON ITS COUNTERCLAIM AND THERE WAS NO COMPETENT EVIDENCE INTRODUCED TO REFUTE THIS PROOF.

The elements of Slander of Title are set forth in First Security bank of Utah v. Banberry Crossing, 780 P.2d 1253 (Utah 1989) as follow:

> Next to be determined is whether Appellees slandered Banberry's title. To prove slander of title, a claimant must prove that (1) there was a publication of a slanderous statement disparaging claimant's title, (2) the statement was false, (3) the statement was made with malice, and (4) the statement caused actual or special damages. citing Bass v. Planned Management Services, Inc., 761 P.2d 566, 568 (Utah 1988), and cases cited therein.

The Banberry Court, Justice Hall, speaking for a unanimous court, went on to say:

> "A slanderous statement is one that is derogatory or injurious to the legal validity of an owner's title or to his or her right to sell or hypothecate the property..."

The record of the court shows unrefuted evidence of all of the elements of Slander of Title and each element will be marshalled and the weight of the evidence shown to prove each point.

First element there was a publication of a slanderous statement disparaging claimant's title.. Mr. West testified that the first survey did not call to a road. (R. 001426)

> Q. And when you were looking at the deed from Spencers to Gillmore, and it says at a point three rods easterly from the centerline of said road and at right angles thereto, along the easterly side of said road three rods easterly from the centerline thereof and at right angles thereto, northerly and easterly to a point three rods east from the southwest corner; and that's the quarter corner, isn't it?
> A. Yes.
> Q. Is that what led you to made a diagonal straight over to that point?
> A. That's the first survey I did. I didn't call out a road, and I put that diagonal through there.
> Q. You concluded there, the first time you drew that, you concluded that you would leave the road from the beginning point and go straight to that point?
> A. I assumed it could have been a road there or 82.5 feet west.
> Q. So you went-you departed from the road at this point and west straight to that line east of the quarter corner?
> A. It didn't tell on the--say a road, it didn't say anything.
> Q. Yes, even though is said northerly and easterly along the orad, you just drew a diagonal.
> A. That's the first survey.
> Q. Yes, that was a logical conclusion to make, you should draw a straight line and depart from the road; then you concluded that you would do it differently and you decided that you would follow the road and depart from the road at a different point. Isn't you departure from the road at the second time you surveyed it just as invalid as you departure from the roadway back here the first time you surveyed it?
> A. (no audible response)

Mr. West also testified (R. 001633) also stated that the first

survey, which was recorded, that when there was no call to the road in the original partition decree did cut across part of Cummings lots. This therefore would constitute a publication that was false.

The second element is where the statement was false. West own testimony at R. 001633 and R. 1426 that this was there was two surveys and the first survey description did not have a description to the road causing a straight call which then cut over property belonging to the Cummings which was evidence by a lis pendens being filed.

The third element is malice, the careless act of filing a survey with an incorrect description no parcelling with the original historical deeds or without checking the history deeds demonstrates malice.

The four element is actual damages. Curtis Oberhansley testified in the Records from 002103 through 002113 of the loss of a sale to the Cummings for property that he was intending to purchase but for the lis pendens and the incorrect description which cause the lis pendens.

All of the above showed that the property owned by Veigh Cummings was slander by the acts of the Plaintiffs.

VII.

CONCLUSION

The Court of Appeals should therefore reverse the decision of the Third District Court, Quiet Title to the disputed strip to Defendant Appellant Cummings, award him his costs and attorney

fees, and direct the lower court to enter a judgement accordingly.

DATED this 10th day of November, 1994.

ADAMSON & SUMMERHAYS

Lowell V. Summerhays

DELIVERY CERTIFICATE

The undersigned hereby certifies that 4 copies of the foregoing Brief were hand-delivered on the 10th day of November, 1994 to the foregoing:

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